Supreme Court, U.S.
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Nos. 87-1614, 87-1639, 87-1668 (5) (7)

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

JOHN W. MARTIN, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

RICHARD ARRINGTON, JR., *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, *et al.*,
Petitioners,
v.
ROBERT K. WILKS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX
Volume I

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CERTIORARI GRANTED JUNE 20, 1988

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TABLE OF CONTENTS

Volume I

	Page
Relevant Docket Entries from Courts Below . .	1
Constitutional Provisions and Statutes Involved	Pet. App. 1a
Complaint (Bennett), April 14, 1982	Pet. App. 110a
Application for Temporary Restraining Order (*Bennett*), April 14, 1982	35
Order (*Bennett*), April 14, 1982	37
Application for Temporary Restraining Order (*Bennett*), April 19, 1982	38
Affidavit of O. Neal Gallant (paragraphs 1-6) (*Bennett*), April 22, 1982	40
Answer of Defendant-Intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard (*Bennett*), April 22, 1982	43
Motion to Intervene as Parties Defendant (*Bennett*), April 22, 1982	46
Notice of Appeal (*Bennett*), April 23, 1982 . .	48
Transcript of Hearing (*Bennett*), April 23, 1982	49
Answer (*Bennett*), served May 3, 1982	87
Application for Temporary Restraining Order (*B.A.C.E*), August 30, 1982	91
Complaint (*B.A.C.E.*), August 30, 1982	93
Answer of Defendant-Intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard (*B.A.C.E.*), served August 31, 1982	101

Page

Answer of the Personnel Board of Jefferson County and Its Members and Director (*B.A.C.E.*), served August 31, 1982 104

Motion to Intervene as Parties Defendant (*B.A.C.E.*), served August 31, 1982 106

Affidavit of John Duncan (paragraphs 1-3) (*B.A.C.E.*), September 1, 1982 109

Transcript of Hearing (*B.A.C.E.*), September 2, 1982 (designated portions) 110

Motion to Dismiss or Alternatively Motion for Summary Judgment by defendants Richard Arrington, Jr. and the City of Birmingham (*B.A.C.E.*), served September 20, 1982 121

Motion to Dismiss or Alternatively Motion for Summary Judgment by the United States (*B.A.C.E.*), served October 13, 1982 125

Motion of Defendant-Intervenors to Dismiss and for Allowance of Costs (*B.A.C.E.*), October 22, 1982 127

Motion to Consolidate (*B.A.C.E.*), served August 4, 1983 129

Complaint (*Wilks*), September 7, 1983 130

Answer by defendants Richard Arrington, Jr. and the City of Birmingham (*Wilks*), served September 28, 1983 135

Motion to Reassign (*Wilks*), served September 28, 1983 138

Order (*Wilks*), September 30, 1983 140

Answer by defendants Hiram McKinney, James B. Johnson, Roderick Beddow, Jr. and the Personnel Board of Jefferson County (*Wilks*), served October 18, 1983 141

Page

Motion to Consolidate (*Wilks*), served October 27, 1983 144

Plaintiffs' Opposition to Motion to Consolidate (*Wilks*), served October 31, 1983 147

Opinion of U.S. Court of Appeals (*Bennett*), styled *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983), December 12, 1983 149

Order (*Wilks*), December 13, 1983 162

Answer of Defendant-Intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard (*Wilks*), February 9, 1984 165

Motion to Intervene as Parties Defendant (*Wilks*), February 9, 1984 169

Complaint in Intervention by John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap (*Wilks*), served February 22, 1984 172

Motion to Intervene by John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap (*Wilks*), served February 22, 1984 173

Opposition to Motion to Intervene as Parties Defendant of Martin, *et al.* (*Wilks*), served February 22, 1984 175

Second Opposition to Motion to Intervene as Parties Defendant of Martin, *et al.* (*Wilks*), served February 24, 1984 177

Transcript of Hearing (*Wilks*), Feb. 28, 1984 (designated portions) 179

Memorandum Opinion and Order (*Wilks*), March 5, 1984 185

Page

Motion of Defendant-Intervenors to Consolidate (*Bennett*, *Garner*, *B.A.C.E.*, *Wilks* and *Zannis*), March 15, 1984 188

Order (*Wilks*), March 20, 1984 192

Amended Answer of Defendants Richard Arrington, Jr., and the City of Birmingham (*Wilks*), served March 26, 1984 194

Plaintiffs' Answer Opposing Defendant-Intervenors' Motion to Consolidate (*Bennett*, *Garner*, *B.A.C.E.*, *Wilks* and *Zannis*), served March 28, 1984 196

Answer of Defendant United States of America (*B.A.C.E.*), served March 29, 1984 202

Motion of Defendant United States for Leave to Amend Motion to Dismiss and to Withdraw Motion for Summary Judgment (*B.A.C.E.*), served March 29, 1984 205

Order (*Bennett*, *Garner* and *B.A.C.E.*), April 2, 1984 207

Motion for Clarification and Reconsideration (exhibits omitted) (*Bennett*, *Garner*, *B.A.C.E.*, *Wilks* and *Zannis*), served April 5, 1984 208

Order, April 12, 1984 218

Motion of Defendants-Intervenors to Dismiss and for Allowance of Costs, served April 14, 1984 (without attachments or exhibits) 220

Motion of Defendants Richard Arrington, Jr. and the City of Birmingham to Dismiss, served April 25, 1984 223

Transcript of Hearing, May 14, 1984 225

Page

Motion of Defendants Richard Arrington, Jr., and the City of Birmingham For Partial Summary Judgment, served Dec. 21, 1984, (pages 1, 2 and first unnumbered paragraph on page 3, only) 253

Motion of Defendant - Intervenors For Partial Summary Judgment, served Dec. 31, 1984 (without attachments) 255

Complaint in Intervention of the United States (*Wilks* and *Bennett*), served January 14, 1985 258

Motion of United States to Realign as Party-Plaintiff (*Bennett*), served January 14, 1985 263

Answer and Counterclaims of Defendant-Intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard to the Complaint in Intervention of the United States (counterclaim omitted) (*Wilks*), served February 13, 1985 265

Volume II

Opinion, February 18, 1985 277

Order, February 18, 1985 292

Motion to Intervene as Parties Plaintiff of David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sussler, Jr., Ronald Vaughn, Rex Earl Kneeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington and Barry Dale Bartlett (exhibits omitted), served February 19, 1985 293

Answer of the Defendant, Personnel Board of Jefferson County, Alabama, to the Amended Complaint in Intervention of

Page

Howard E. Pope, served February 26, 1985 295

Personnel Board's Answer to the Complaint of James A. Bennett, served February 26, 1985 298

Personnel Board's Answer to the Complaint in Intervention of John E. Garvich, Jr., served February 26, 1985 301

Personnel Board's Answer to the Complaint in Intervention of the United States of America, served February 26, 1985 302

Personnel Board's Answer to Amendment of Complaint of Victor Zannis, served February 26, 1985 305

Motion to Intervene and Complaint in Intervention of Raymond V. Martin (*Zannis*), served March 4, 1985 307

Order, March 7, 1985 308

Amended Answer and Counterclaims of Defendants Richard Arrington, Jr., and the City of Birmingham to the Complaint in Intervention of the United States (counterclaim omitted) (*Wilks*), served March 11, 1985 309

Motion to Intervene and Complaint in Intervention of Donald Vaughn (*Garner*), served April 10, 1985 314

Order, April 17, 1985 315

Amendment to Answers by defendant the Personnel Board of Jefferson County (*Wilks*, *Zannis*, *Bennett* and *B.A.C.E.*), served May 3, 1985 316

Complaint in Intervention of the United States (*Zannis*), served May 16, 1985 319

Page

Motion of United States to Realign as Party-Plaintiff (*B.A.C.E.*), served May 16, 1985 324

Transcript of Hearing, July 3, 1985 (designated portions) 326

Order, July 8, 1985 329

Motion to Intervene and Complaint in Intervention of Charles E. Carlin (*Wilks*), served July 10, 1985 331

Order, August 9, 1985 332

Answer of Defendant Jefferson County Personnel Board to the Complaint in Intervention of Charles E. Carlin (*Wilks*), served August 22, 1985 333

Answer of Defendant-Intervenors to the Complaint in Intervention of Charles E. Carlin (*Wilks*), August 29, 1985 335

Answer of Defendants Richard Arrington, Jr. and the City of Birmingham to the Complaint in Intervention of Charles E. Carlin (*Wilks*), served August 29, 1985 .. 337

Motion of the United States for PreTrial Evidentiary Ruling on Burdens of Proof, served Sept. 14, 1985 (without attachments or memorandum) 340

Transcript of Hearing, Sept. 17, 1985 (designated portions) 342

Transcript of Hearing, Oct. 31, 1985 (designated portions) 348

Motion In Limine of United States to Exclude Certain Testimony and Exhibits listed in Defendants' Joint List of Trial Exhibits and Witnesses, served December 3, 1985 351

Page

Transcript of Status Conference, December 5, 1985 (designated portions) 353

Transcript of 1985 Trial, December 16-20, 1985 (designated portions) 356

1985 Trial DX 1982, Job Announcement for Engineering Aide II (Tracer), February 7, 1957 427

1985 Trial DX 1983, Job Announcement for Engineering Aide III, (Rodman), January 15, 1957 428

1985 Trial Exhibit PX 1 - Cover Page, Sections 16, 17, 18, 20 and 25 429

1985 Trial PX 23, Stipulation (Parts I and III) 436

1985 Trial Exhibit PX 31 - Gallant deposition (designated portions) 448

1985 Trial Exhibit PX 33 - Graham deposition, 11/15/82 (designated portions) 469

1985 Trial Exhibit PX 36 - Euel Laughlin Deposition (designated portions) 471

1985 Trial Exhibit PX 44 - Executive Order 35-81 and Prototype Affirmative Action Plan 478

1985 Trial Chart Exhibits

PX 180 487

PX 182 488

PX 184 489

PX 186 490

PX 187 491

PX 188 492

PX 189 493

PX 190 494

PX 192 495

	Page
PX 193	496
PX 194	497
PX 195	498
PX 196	499
PX 197	500
PX 466	501
1985 Trial PX 400 - Graham deposition, 8/20/85 (designated portions)	502
U.S. Exhibit 3 (City Resolution 547-81)	515
U.S. Exhibit 8 (Ordinance No. 77-88)	516
1985 Trial PX 403 & DX 2236 -Arrington deposition (designated portions)	520
1985 Trial PX ___, Brief of Defendant Appellee City of Birmingham, U.S.C.A., 11th Cir., number 81-7761 (Jefferson County), received as Exhibit at 1985 trial at Tr. 1308-1309 (cover page and pages 1-24)	534
Trial Transcript of the District Court's findings of fact and conclusion of law, December 20, 1985	Pet. App. 27a
Defendants Richard Arrington, Jr. and the City of Birmingham and Defendant-Intervenors' Proposed Findings of Fact, December 20, 1985	Pet. App. 37a
Order and Partial Final Judgment, December 23, 1985	Pet. App. 67a
Plaintiffs' and United States' Motion to Amend Judgment, December 26, 1985	Pet. App. 69a
Order, January 6, 1986	Pet. App. 75a
Combined Findings of Fact and Conclusions of Law	Pet. App. 77a
Opinion of the Court of Appeals, December 15, 1987 (as amended)	Pet. App. 3a

Page

Order of the Court of Appeals on Petition for Rehearing and Suggestion of Rehearing En Banc, January 25, 1988 ..... Pet. App. 25a

Volume III

From *United States v. Jefferson County* and the cases consolidated therewith.

Memorandum of Opinion (*Ensley Branch*), January 10, 1977 (1985 Trial DX 1422) .. 553

Order (*Ensley Branch*), January 10, 1977 (1985 Trial DX 1422) 588

1979 Trial DX 360 (Table One - Adverse Impact Counts By Race) (part of 1985 Trial DX 1980) 590

1979 Trial PX 7, Job Announcement for Firefighter for Bessemer, Birmingham, Fairfield, Homewood, Mountain Brook and Tarrant City, April 26, 1957 (part of 1985 Trial DX 1980) 591

1979 Trial PX 70 (pp. 1, 7), Promotional Potential Ratings of Blacks and Whites By Department, August 1977-January 1978 (part of 1985 Trial DX 1980) 592

Plaintiff United States' Post-Trial Brief and Review of Evidence, volumes 1 and 2 (*Jefferson County*), served November 9, 1979 (1985 Trial DX 1428 and DX 1429) .. 594

Consent Decree with the City of Birmingham, *United States v. Jefferson County, et al.*, signed by the parties May 19, 1981 (1985 Trial PX 41) ..... Pet. App. 122a

Consent Decree with the Jefferson County Personnel Board, *United States v. Jefferson County, et al.*, signed by the parties May 19, 1981 (1985 Trial PX 5) ..... Pet. App. 202a

Page

*Order (*Jefferson County*), June 8, 1981 694

*Affidavit of Publication of Notice of Consent Decree (*Jefferson County*), June 25, 1981 697

*Motion for Leave to Appear and File Brief Amicus Curiae of the Birmingham Firefighters Association 117 and Billy Gray (*Jefferson County*), served July 14, 1981 699

*Petition of Birmingham Firefighters Association 117 and Billy Gray to Appear as Interested Persons (*Jefferson County*), served July 14, 1981 701

*Objections to the Proposed Consent Decrees by Johnny Morris, Jessie Sprayberry, B. R. Stephens, J. R. Davis, John Dipiazza, Juanita Eaton and Barbara Buckland (*Jefferson County*), July 14, 1981 714

*Response of the United States to Objections to the Proposed Consent Decrees (*Jefferson County*), served July 28, 1981 717

Transcript of Hearing (*Jefferson County*), August 3, 1981 (1985 Trial DX 1431) ... 727

*Affidavit of Billy Gray (*Jefferson County*), August 4, 1981 772

*Motion to Intervene of the Birmingham Firefighters Association 117, Billy Gray and Tommy Sullivan (*Jefferson County*), August 4, 1981 774

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* These items are not formally in the record, and are included over the objection of Respondents' Wilks, *et al.* They are included by Petitioners on the basis that the district court on at least three occasions took judicial notice of the record in *United States v. Jefferson County*, the litigation that resulted in the consent decrees. *See* J.A. 54, 111, 186.

	Page
*Reply Brief of Firefighter Objectors (*Jefferson County*), served August 5, 1981 . . .	777
Opinion of the District Court, *United States v. Jefferson County, et al.*, August 18, 1981	Pet. App. 236a
Order and Judgment, *United States v. Jefferson County, et al.*, August 18, 1981 . . .	Pet. App. 247a
*Order Granting, In Part, Motion to Intervene and Granting Intervenors' Application for Temporary Restraining Order (*Jefferson County*), August 5, 1983	782
*Clerk's Court Minutes (*Jefferson County*), September 14, 1983	784

* These items are not formally in the record, and are included over the objection of Respondents' Wilks, *et al.* They are included by Petitioners on the basis that the district court on at least three occasions took judicial notice of the record in *United States v. Jefferson County*, the litigation that resulted in the consent decrees. *See* J.A. 54, 111, 186.

Relevant Docket Entries from Courts Below

Bennett, et al. v. Arrington, et al., CV 82-P-850-S

Apr. 14, 1982	Complaint filed-snh.
Apr. 14, 1982	Application of plaintiff for temporary restraining order, filed-snh (del to SCP) See Order dated 04/15/82.
Apr. 15, 1982	Order that the application for TRO is denied, without prejudice to the rights of the parties to bring this cause again before the court filed (POINTER); entered 04/15/82-cm-snh.
Apr. 15, 1982	Summons, complaint, application and order issued - del to USM-snh.
Apr. 19, 1982	Application of plaintiffs for TRO filed-snh.
Apr. 19, 1982	Affidavit of Billy Gray with exhibits attached, filed-snh.
Apr. 22, 1982	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, to intervene as parties defendant with exhibits attached, filed-cs-snh.
Apr. 22, 1982	Affidavit of O. Neal Gallant with exhibits attached, filed-cs-snh.
Apr. 23, 1982	On hearing before the Honorable Sam C. Pointer, Jr. on application of plaintiffs' for temporary restraining order - motion to intervene as party defendants previously filed - granted in part - answer of defendant intervenors to complaint filed - affidavit of Floyd E. Click, 2nd affidavit of Billy Gray, affidavit of James L. Wint, affidavit of Robert Sorrell and affidavit of Larry D. Miskelly, filed - case submitted to the court on various affidavits filed, briefs & complaint & any testimony taken - testimony of plaintiffs' - plaintiffs' rest

	- oral arguments by counsel - findings of fact and conclusions of law dictated into the record by the Court denying the application for temporary restraining order - parties agree the application for temporary restraining order may also be considered and request for preliminary injunction & defendants waive notice - Court so considers and denys [sic] request for preliminary injunction based on same evidence - notice of appeal by plaintiffs filed - motion of plaintiffs' for stay pending appeal filed - denied - Rptr - Mayra Malone - lpc.
Apr. 23, 1982	Clerk's Court Minutes that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, the application of plaintiffs' for a temporary restraining order is DENIED; and the request of plaintiffs' for a preliminary injunction is DENIED based upon the same evidence; and the case is continued for further development and potential trial, filed; entered 04/23/82-cm-snh (Mayra Malone, Court Reporter).
Apr. 26, 1982	Transcript of proceedings had before the Hon. Sam C. Pointer, USDJ, at Birmingham, Ala. on April 23, 1982 - filed -dgs.
May 3, 1982	Answer of defendants, Richard Arrington, Jr. and City of Birmingham, to the complaint, filed-cs-snh.
May 3, 1982	Certified copy of an Order of the USCA, Atlanta that the application of appellants for stay pending appeal is in reality a petition for a restraining order of injunction [sic] pending appeal and the application is DENIED - filed -dgs.
May 27, 1982	Certified copy of an Order of the USCA, Atlanta that the motion of appellants to consolidate the appeals in 74 P

	12, 74 P 17, 75 P 666 and 82 P 850 is GRANTED - filed - dgs.
June 1, 1982	Order of the USCA, Atlanta, that appellees' motion for an order awarding reasonable costs and attorneys' fees is DENIED — filed.
Feb. 21, 1984	Certified copy of Judgment, USCA, dated 12-12-83 and issued as mandate 2-17-84, that the Order of the District Court is AFFIRMED and the plaintiffs-appellants pay to defendants-appellees costs on appeal with slip Opinion and bills of cost attached filed (TJOFLAT, FAY & ANDERSON); record to be returned later - dpb.
Mar. 15, 1984	Motion of plaintiffs to amend complaint, with proposed amendment thereon, filed-cs-s.
Mar. 19, 1984	Motion of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, Thomas and Howard, in this and CV 83-AR-2116-S, CV 83-AR-2680-S, CV 82-P-1461-S, and CV 82-P-1852-S, for consolidation, filed-cs-snh. See Order dated 4/2/84.
Mar. 26, 1984	Response of plaintiffs in this and related cases to defendant-intervenors motion for consolidation, filed-cs-slm.
Mar. 27, 1984	Motion of defendant intervenor Wanda Thomas in this and related cases to withdraw from participation in these actions, filed-cs-slm (del to SCP).
Apr. 2, 1984	Order in this and 82-P-1461-S and 82-P-1852-S that these three cases are consolidated with 83-AR-2116-S and 83-AR-2680-S for pretrial purposes, subject to further court order; two cases currently pending before Judge Acker are reassigned to Judge Pointer, filed (POINTER); entered 4/2/84-cm-slm.

Apr. 5, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/10/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs - See order dated 4/12/84.
Apr. 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010-S for pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that the order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs' and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
Jan. 14, 1985	Motion of USA to realign as party plaintiff, filed-cs-slm (del to SCP). See Order dated 2/18/85 in CV 84-P-0903-S.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 83-P-2116-S, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint of James A. Bennett, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint in intervention of USA, filed-cs-slm.
Mar. 11, 1985	Answer and Counterclaims of Martin, et al, defendant-intervenors to USA's complaint in the intervention filed-cs-slm (filed in this and 84-0903-S).
Mar. 12, 1985	Answer and Counterclaims of defendants Arrington and City of Birmingham to complaint in intervention of

	USA, filed in this and 84-P-0903-S-cs-slm.
Mar. 22, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of Martin intervenors filed-cs-slm.
Mar. 22, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of defendants Arrington and City of Birmingham, filed-cs-slm.

Birmingham Association of City Employees, et al., v. Arrington, et al., CV 82-P-1852-S

Aug. 30, 1982	Complaint filed-snh.
Aug. 30, 1982	Motion (application) of plaintiff for temporary restraining order filed-snh.
Sept. 1, 1982	Motion of defendant, Personnel Board of Jefferson County, to dismiss the complaint filed-cs-snh- DENIED. See bench notes 9/2/82-1pc.
Sept. 1, 1982	Answer of defendant, Personnel Board of Jefferson County, to the complaint filed-cs-snh.
Sept. 1, 1982	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard, to intervene in this action as parties defendant, filed-cs-snh - GRANTED. See bench notes 9/2/82-1pc.
Sept. 2, 1982	On hearing before the Hon. Sam C. Pointer, Jr. on application of the plaintiffs for a temporary restraining order - motion of defendant Personnel Board to dismiss previously filed - DENIED - motion of Martin intervenors previously filed - GRANTED - testimony of plaintiffs - plaintiffs rest - arguments by counsel - findings of fact and conclusions of law dictated into the record by the court denying the application of

	plaintiffs for a temporary restraining order - Rptr: Brenda Evans - 1pc.
Sept. 2, 1982	Answer of defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, to the complaint, filed-cs-1pc.
Sept. 2, 1982	Clerk's Court Minutes that pursuant to the findings of fact and conclusions of law dictated into the record by the Court, that the application of the plaintiffs for a temporary restraining order is DENIED, filed; entered 09/02/82-cm-snh.
Sept. 2, 1982	Affidavit of John Duncan filed-snh.
Sept. 21, 1982	Motion of defendants, Richard Arrington, Jr. and City of Birmingham, to dismiss or in the alternative for summary judgment filed-cs-snh. 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
Oct. 7, 1982	Summons and complaint and clerk's court minutes returned executed 09/10/82 on Jefferson County Personnel Board, Director Curtin; Members of the Personnel Board; Joseph Curtin; Hiram Y. McKinney; City of Birmingham; Henry P. Johnston Richard Arrington, Jr. and UNEXECUTED on James B. Johnson, filed-snh.
Oct. 7, 1982	Transcript of proceedings had before the Honorable Sam C. Pointer, Jr. on September 2, 1982 in Birmingham, Alabama, with exhibits attached, filed-snh (Brenda Evans, Court Reporter).
Oct. 12, 1982	Summons, complaint and clerk's court minutes returned executed 09/14/82 on USA; 09/17/82 on Atty. Gen., filed-snh.
Oct. 13, 1982	Motion of defendant, USA, to dismiss or in the alternative for summary judg-

	ment with exhibits attached, filed-cs-snh (del to SCP for 10/22/82- m.d.) 5/14/84 GRANTED AS AMENDED (POINTER); entered 5/14/84-cm-slm.
Oct. 26, 1982	Motion of defendant-intervenors, John W. Martin, et al, to dismiss and for allowance of costs, filed-cs-snh — 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
Dec. 3, 1982	Answer of defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to the complaint, filed-cs-snh.
Mar. 2, 1983	Motion of plaintiffs to amend the complaint, filed-cs-slm — 4/22/83 GRANTED (POINTER); entered 4/25/83-cm-slm.
Aug. 4, 1983	Motion of plaintiffs to consolidate this and CV 74P-12-S, CV 74-P-17-S and CV 75P-666-S, filed-cs-slm.
Mar. 19, 1984	Motion of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, Thomas and Howard, in this and CV 83-AR-2116-S, CV 83-AR-2680-S, CV 82-P-0850-S, CV 82-P-01461-S, for consolidation, filed-cs-snh. See order dated 4/2/84.
Mar. 26, 1984	Response of plaintiffs in this and related cases to defendant-intervenors motion for consolidation.
Mar. 27, 1984	Motion of defendant intervenor Wanda Thomas in this and related cases to withdraw from participation in these actions, filed-cs-slm (del to SCP) — 4/4/84 GRANTED (POINTER); entered 4/4/84-cm-slm.
Mar. 30, 1984	Motion of defendant USA to amend motion to dismiss and to withdraw motion for summary judgment, filed-cs-slm

	(del to SCP). 5/14/84 GRANTED (POINTER); entered 5/14/84-cm-slm.
Mar. 30, 1984	Answer of defendant USA to the complaint, filed-cs-slm.
April 2, 1984	Order in this and 82-P-850-S and 82-P-1461-S that these three cases are consolidated with 83-AR-2116-S and 83-AR-2680-S for pretrial purposes, subject to further court order; two cases currently pending before Judge Acker are reassigned to Judge Pointer, filed (POINTER); entered 4/2/84-cm-slm.
April 2, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/20/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs-slm. See order dated 4/12/84.
April 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010-S pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that that order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-.
April 18, 1984	Opposition of defendant-intervenors to USA's motion for leave to amend the motion to dismiss and to withdraw motion for summary judgment, filed-cs-snh in this and 84-0903-S.

May 17, 1985	Motion of USA to realign as party plaintiff, with proposed complaint in intervention attack filed-cs-slm. See order dated 7/8/85.
July 8, 1985	Answer of defendants Arrington and City of Birmingham to USA's complaint in intervention with counterclaim thereon, filed-cs-slm.
July 15, 1985	Counterclaim (Amendment) of defendants Arrington and City of Birmingham in this and 84-0903-S to complaint in intervention of USA, filed-cs-slm.
July 17, 1985	Answer of defendant intervenors Martin, et al to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.
July 18, 1985	Motion of USA in this and 84-0903-S to dismiss the counterclaim of Arrington and City of Birmingham, filed-cs-slm.
July 26, 1985	Motion of USA in this and 84-0903-S to dismiss amendment to counterclaim of Arrington and City of Birmingham, filed-cs-slm.
July 26, 1985	Motion of USA in this and 84-0903-S to dismiss counterclaim of Martin, et al intervenors, filed-cs-slm.

Wilks, et al. v. Arrington, et al., CV 83-AR-2116-S

Sept. 7, 1983	Complaint, filed-tyt. Summon and complaint issued - del. to plaintiff-tyt.
Sept. 15, 1983	Amendment to the complaint, filed-cs-snh. Summons, complaint and amendment issued - del to plaintiff for service on James B. Johnson-snh.
Sept. 28, 1983	Motion of defendants Arrington and City of Birmingham to reassign this case to the Hon. Sam C. Pointer, Jr., filed-cs-tyt. (Del. WMA) See 9/30/83 Order.

Sept. 28, 1983	Answer of defendants Richard Arrington, Jr., and City of Birmingham to complaint, filed-cs-tyt.
Sept. 30, 1983	Order that motion to reassign is DENIED, filed (ACKER) entered 9/30/83-cm-tyt.
Oct. 18, 1983	Answer of defendant, Hiram Y. McKinney, James B. Johnson and Roderick Beddow, Jr., and the Personnel Board of Jefferson County, to the complaint, filed-cs-lpc.
Oct. 27, 1983	Motion of defendants Richard Arrington, Jr. and City of Birmingham to consolidate with CV 75-P-0666, filed-cs-tyt. (Del. WMA) See 12/13/83 Order.
Oct. 31, 1983	Opposition of plaintiffs to motion to consolidate, filed-cs-tyt (Del. WMA).
Dec. 13, 1983	Order that defendants motion to consolidate is DENIED, filed (ACKER) entered 12/13/83-cm-tyt.
Feb. 9, 1984	Motion of John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to intervene as parties defendant, filed-cs-tyt - See Order of 3/5/84.
Feb. 24, 1984	Motion of John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap to intervene as parties plaintiff, filed-cs-tyt (Del. WMA) See 3/5/84 Order.
Feb. 24, 1984	Opposition of plaintiffs to motion to intervene as parties defendant of Martin, et al. filed-cs-tyt (Del. WMA).
Feb. 24, 1984	Opposition (second) of plaintiffs to motion to intervene as parties defendant Martin, et al, filed-cs-tyt (Del. WMA).
Feb. 28, 1984	Hearing (with CV 83-AR-2680-S) on motions, combined with status conference, before the Hon. William M.

	Acker, Jr. - Oral motion of USA to intervene as party plaintiff - taken under advisement, written ruling to be entered - Charles Cooper, Deputy Attorney General and William Worthen and Richard Ritter, Attorneys, Civil Rights Division of Dept. of Justice, admitted pro hac vice upon oral motion of U.S. Atty; written formal order to be entered; written rulings on pending matters to be entered by the Court - RPTR: Lee Cook -rfd.
March 5, 1984	Memorandum opinion and order that the Court allows intervention of the United States and is required to file a complaint-in-intervention on or before 6/15/84; the Court will allow intervention by Martin, Florence, McGruder, Coal, Thomas, Thomas and Charles Howard as individuals but not as representatives of a class unless and until they meet the requirements of Rule 23, FRCP in *this* case; petition of Garvich, Henson and Millsap to intervene as parties plaintiff is due to be granted and shall be designated simply as "plaintiffs" rather than intervenors and all further pleadings shall treat Garvich, et al., as if they had been original plaintiffs; pretrial conference is CONTINUED and re-set on 6/1/84 at 1:30 p.m.; all discovery shall be completed on or before 6/15/84, filed (ACKER) entered 3/6/84-cm-tyt.
March 6, 1984	Complaint in intervention of John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap, filed-cs-tyt.
March 6, 1984	Answer of defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard to complaint, filed - no cs-tyt.
March 6, 1984	Motion of defendants Arrington and City of Birmingham to condition inter-

	vention upon compliance with FRCP Rule 24(c), filed-cs-tyt (Del. WMA) See 3/8/84 Order.
March 8, 1984	Order dated 3/6/84 that motion of defendants to condition intervention is DENIED without prejudice to its being refiled on or after 6/15/84, filed (ACKER) entered 3/8/84-cm-tyt.
March 19, 1984	Motion of defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, in this and CV 83-AR-2680-S, CV 82-P-0850-S, CV 82-P-1461-S and CV 82-P-1852-S, to consolidate, filed-cs-sr. — See Order 3/20/84.
March 20, 1984	Affidavit of O. Neal Gallant, filed-cs-tyt (del WMA).
March 20, 1984	Order that the motion to consolidate is DENIED; there is, however, no intention to rule on any motion pending in a case not assigned to the undersigned, filed (ACKER) entered 3/20/84-cm-lpc.
March 21, 1984	Motion of defendant-intervenors Martin, Florence, McGruder, Coar, W. Thomas, E. Thomas and C. Martin to dismiss U.S. as intervenor in this and CV 83-AR-2680 filed-cs-tyt (Del. WMA) DENIED 3/23/84 (ACKER) entered 3/26/84-cm-tyt.
March 27, 1984	Answer of plaintiffs opposing defendant-intervenors' motion to consolidate, filed-cs-tyt.
March 27, 1984	Answer of defendants Arrington and City of Birmingham to complaint in intervention, filed-cs-tyt.
March 29, 1984	Answer (Amended) of defendant-intervenors to the complaint, filed-cs-slm.

April 5, 1984	Motion of plaintiffs in this and related cases for clarification and reconsideration of 3/20/84 order of Judge Acker and 3/30/84 order of Judge Pointer, filed-cs-slm - See order dated 4/12/84.
April 6, 1984	Answer of defendant-intervenors to complaint in intervention of John E. Garvich, Jr., James W. Henson and Robert Bruce Milsap, filed-cs-slm.
April 10, 1984	Transcript of proceedings had before Hon. William A. Acker, Jr., on 2/28/84 in Birmingham, Alabama, filed in this and CV 83-P-2680-S (orig. placed in this file).
April 12, 1984	Order in this and related cases that these cases are consolidated with 83-P-3010 - pretrial purposes; plaintiffs' motion of 4/5/84 is granted to the extent that the order dated 4/2/84 is amended so reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; a master file for these consolidated cases is established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs and James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 82-P-0850-S-cs-slm (del to SCP).
Feb. 12, 1985	Answer in this and 84-P-0903-S of defendants Arrington and City of Birmingham to the complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.

Feb. 14, 1985	Answer of Martin intervenors to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm.
Feb. 26, 1985	Answer of defendant Jeffco Personnel Board to complaint in intervention of USA, filed-cs-slm.
Feb. 26, 1985	Answer of defendant Jeffco Personnel Board to amended complaint in intervention of Howard Pope, filed-cs-slm.
Feb. 26, 1985	Answer of Jeffco Personnel Board to complaint in intervention of John E. Garvich, filed-cs-slm.
March 12, 1985	Motion of defendants Arrington and City of Birmingham to amend their answer to USA's complaint in intervention, filed in this and 84-0903-S-cs-slm.
April 15, 1985	Motion of United States in this and 84-P-0903-S to dismiss the counterclaims of Martin et al defendant-intervenors, filed-cs-slm.
Aug. 23, 1985	Answer of defendant Jeffco Personnel Board in this and 84-0903-S to complaint in intervention of Charles Carlin, filed-cs-slm.
Aug. 29, 1985	Answer of defendants Arrington and City of Birmingham in this and 84-0903-S to complaint in intervention of Charles Carlin, filed-cs-slm.
Sept. 3, 1985	Answer in this and 84-0903-S of Martin defendant-intervenors, to complaint in intervention of Charles Carlin, filed-cs-slm.

In Re: Birmingham Reverse Discrimination Employment Litigation, CV 84-P-903-S

April 12, 1984	Order that plaintiffs' motion in CV 82-P-0850-S, CV 82-P-1852-S, CV 83-P-2116-S and CV 83-2680-S of 4/5/84 is granted to the extent that the order of

	4/2/84 is amended so that the reference to CV 83-AR-2166-S reads CV 83-AR-2116-S; in all other respects said motion is denied; pursuant to FRCP 42, CV 83-P-3010-S is consolidated for pretrial purposes with CV 82-P-0850-S, CV 82-P-1461-S, CV 82-P-1852-S, CV 83-P-2116-S and CV 83-P-2680-S; a master file for these consolidated cases is established under the caption "In Re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S; a pretrial conference will be held at 9 a.m., 5/14/84; Raymond Fitzpatrick to act as lead counsel for plaintiffs, James Alexander to act as lead counsel for defendants, filed (POINTER); entered 4/12/84-cm-slm.
April 13, 1984	Answer of defendants, Richard Arrington, Jr. and the City of Birmingham, to the amended complaint (CV 83-P-2680-S) filed-cs-snh.
April 16, 1984	Motion of Defendant-Intervenors John W. Martin, et al, in this and related cases, to dismiss the complaints, with exhibits attached, filed-cs-sjl - 5/14/84 OVERRULED (POINTER); entered 5/14/84-cm-slm.
April 18, 1984	Opposition of defendant-intervenors to USA's motion for leave to amend motion to dismiss and to withdraw motion for summary judgment filed-cs-snh.
April 25, 1984	Motion of defendants Arrington and City of Birmingham to dismiss complaints in 82-850-S, 82-146-S, 83-2116-S and 83-2680-S, filed-cs-slm.
May 4, 1984	Opposition of plaintiffs to defendant-intervenors motion to dismiss the complaints, filed-cs.
May 22, 1984	Transcript of proceedings had before the Hon. Sam C. Pointer, Jr. on 5/14/84, in Birmingham, Alabama,

	filed-slm (Mayra Malone - Court Reporter).
July 13, 1984	Motion of Michael W. Martin and Howard E. Pope to intervene, with proposed complaint in intervention attached, filed-cs-slm (del to SCP) 7/23/84 GRANTED as to Howard Pope; otherwise DENIED (POINTER); entered 7/23/84.
July 17, 1984	Motion (amendment-voluntary dismissal) of proposed plaintiff-intervenor Michael W. Martin to withdraw his motion to intervene, filed-cs-slm (del to SCP).
Aug. 1, 1984	Complaint in Intervention of Howard E. Pope, filed-cs-slm.
Aug. 13, 1984	Answer of defendant Arrington and City of Birmingham to amended complaint in intervention of Howard E. Pope, filed-cs-slm.
Aug. 13, 1984	Answer of defendant-intervenors Martin, et al to amended complaint in intervention of Howard E. Pope, filed-cs-slm.
Oct. 23, 1984	Motion of plaintiffs James A. Bennett, Gerald L. Johnson, Philip H. Whitley, David H. Woodall, Danny R. Laughlin, Marshall H. Whitson and Dudley L. Greenway to dismiss their individual claims, filed-cs-slm (del to SCP). 12/14/84 GRANTED (POINTER); entered 12/14/87-cm-slm.
Dec. 21, 1984	Motion of defendants Arrington and City of Birmingham for partial summary judgment, with affidavits of W. Gordon Graham, John L. Duncan, O. Neal Gallant and Arthur V. Deutcsh and exhibits attached, filed-cs-slm. See order dated 2/18/85.

Jan. 2, 1985	Motion of defendant-intervenors Martin, et al for partial summary judgment, filed-cs-slm. See order dated 2/18/85.
Jan. 14, 1985	Complaint in intervention of USA filed in this and 83-P-2116-S and 82-850-S, filed-cs-slm. (del to SCP).
Jan. 14, 1985	Motion of USA to realign as party plaintiff filed in this and 82-P-0850-S, filed-cs-slm. See order dated 2/18/85.
Jan. 22, 1985	Motion of USA to strike certain affidavits or portions thereof, filed-cs-slm. See order dated 2/18/85.
Jan. 22, 1985	Response of plaintiff Wm. Garner to defendant intervenors and defendant Arrington for partial summary judgment, filed-cs-slm.
Jan. 22, 1985	Response of USA in opposition to defendant intervenors, defendants Arrington and City of Birmingham for partial summary judgment, filed-cs-slm.
Jan. 22, 1985	Opposition of plaintiffs to motions for partial summary judgment with exhibits attached-filed-cs-slm.
Feb. 5, 1985	Affidavit (supplemental) of W. Gordon Graham with exhibits attached, filed-cs-slm.
Feb. 12, 1985	Answer of defendants Arrington and City of Birmingham in this and 83-P-2116-S to USA's complaint in intervention, with counterclaim thereon, filed-cs-slm.
Feb. 12, 1985	Answer of Martin intervenors to complaint in intervention of USA, with counterclaim thereon, filed-cs-slm (placed in 83-P-2116-S).
Feb. 15, 1985	Opposition (supplemental) of plaintiffs to motions for partial summary judgment, filed-cs-slm.

Feb. 19, 1985	Memorandum of Opinion, dated 2/18/85, filed (POINTER); entered 2/19/85-cm-slm.
Feb. 19, 1985	Order dated 2/18/85 in accordance with Memorandum of Opinion entered contemporaneously that motions for partial summary judgment of defendants are denied; pursuant to FRCP 42(b), issues regarding the effect and validity of Personnel Board tests are severed for subsequent trial after resolution of the other issues in this case; all discovery pertaining to effect and validity of Personnel Board tests is deferred until completion of the initial trial; USA's motion to strike affidavits or portions thereof is denied; USA's motion to realign as party plaintiff in 82-P-850-S is granted, subject to limitations in accompanying Memo of Opinion, filed (POINTER); entered 2/19/85-cm-slm.
Feb. 19, 1985	Motion of USA to strike portions of supplemental affidavit of W. Gordon Graham, filed-cs-slm (del to SCP)—See order dated 3/7/85.
Feb. 20, 1985	Motion of David L. Hamilton, Randy E. Woods, Stanley D. Rogers, James R. Pharris, William V. Sulser, Jr., Ronald Vaughn, Rex Earl Keeling, Mike C. Thomas, Kenneth W. Smith, John E. Courington and Barry Dale Bartlett to intervene as party plaintiffs in this cause, with proposed complaint in intervention and exhibits attached, filed-cs-slm (del to SCP). See order dated 3/7/85.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint of James A. Bennett, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to amended complaint in intervention of Howard E. Pope, filed-cs-slm.

Feb. 26, 1985	Answer of Jefferson County Personnel Board to amended complaint of Victor Zannis, filed-cs-slm.
Feb. 26, 1985	Answer of Jefferson County Personnel Board to complaint in intervention of USA, filed-cs-slm.
Mar. 5, 1985	Motion of Raymond V. Martin to intervene as additional party plaintiff, filed-cs-slm — See order dated 4/17/85.
Mar. 7, 1985	Order that motion of United States to strike portions of supplemental affidavit of W. Gordon Graham is denied; motion to intervene as parties plaintiff on behalf of D. Hamilton, R. Woods, S. Rogers, J. Pharris, W. Sulser, R. Vaughn, R. Keeling is granted and these parties are given leave to intervene in CV 82-P-1461-S; time within which defendants must respond to claims of these intervening plaintiffs is suspended until 20 days after completion of the first trial in this case, or until otherwise ordered by the Court, filed (POINTER); entered 3/8/85-cm-slm.
Mar. 11, 1985	Answer and Counterclaim of Martin, et al, defendant intervenors to USA's complaint in intervention, filed-cs-slm.
Mar. 12, 1985	Answer and Counterclaim of defendants Arrington and City of Birmingham to complaint in intervention of USA, filed in this and 82-P-0850-S-cs-slm.
Mar. 12, 1985	Motion of defendants Arrington and City of Birmingham to amend their answer to USA's complaint in intervention in 83-2116-S, with proposed amendment attached, filed-cs-slm — See order dated 4/17/85.
April 12, 1985	Motion of Donald Vaughn to intervene, with complaint in intervention thereon,

	filed-cs-slm (del to SCP) — See order dated 4/17/85.
April 15, 1985	Motion of United States in this and 83-P-2116-S to dismiss the counterclaim of Martin; et al defendant-intervenors, filed-cs-slm (del to SCP).
April 15, 1985	Motion of United States in this and 83-P-2116-S to dismiss the counterclaims of defendants Arrington and City of Birmingham, filed-cs-slm (del to SCP).
April 18, 1985	Order dated 4/17/85 that the motion to admit Frederick Linton Medlin pro hac vic is granted; motion to intervene on behalf of Raymond V. Martin in 83-2680-S is granted, but the time within which the defendants must file an answers or responsive pleadings is suspended until 20 days following completion of the first trial in case; motion to intervene on behalf of Donald Vaughn in 82-1461-S is granted, but the time within which the defendants must file an answer or responsive pleading suspended until 20 days following completion of the first trial in this case; motion to amend filed on behalf of defendants Arrington and City of Birmingham in 83-2116-S is granted, filed (POINTER); entered 4/18/cm-slm.
April 18, 1985	Answer (Amended) of defendants Arrington and City of Birmingham to complaint in intervention of USA, with counterclaim thereon, filed in this and 83-2116-S, cx-slm.
April 22, 1985	Motion of USA in this and 82-0850-S to dismiss counterclaim of Martin intervenors-filed-cs-slm.
April 22, 1985	Motion of USA in this and 82-0850-S to dismiss counterclaim of defendants Arrington and City of Birmingham—filed-cs-slm.

May 3, 1985	Motion of Personnel Board of Jefferson County to amend answers in 83-2116-S, intervention of Pope in 83-2116-S, intervention of Garvick in 83-2116-S, intervention of USA in 83-2116-S and 82-850-S, 82-850-S, 82-1852, 83-2680-S, filed-cs-slm (del to SCP)—See order dated 7/8/85.
May 17, 1985	Motion of USA in this and 82-1852-S to realign as party plaintiff, with proposed complaint in intervention attached, filed-cs-slm—See order dated 7/8/85.
May 17, 1985	Complaint in Intervention of USA in this and 83-2680-S, filed-cs-slm.
June 3, 1985	Response of USA to defendant intervenors' first request for admissions re: history of race discrimination, filed-cs-slm.
July 8, 1985	Order that the United States' motion to realign in 82-1852-S is granted to the extent that the United States in good faith believes that actions of City are discriminatory against plaintiffs and neither required nor permitted by the consent decree; time within which defendants must answer complaint in intervention of U.S. in 83-2680-S is postponed until 20 days following completion of first trial in this case or such time as otherwise ordered by the Court; City's motion to quash subpoenas duces tecum directed to Chiefs Gallant and Laughlin is moot; City's motion for protective order is granted, subject to City's indication during the conference that it is willing to produce a summary describing the general policies and procedures for promotion within Police and Engineering Depts. upon request; Personnel Board's motion to amend its answers is granted; U.S.'s motion to quash subpoena duces tecum directed to Richard Ritter is granted insofar as Mr. Ritter need not produce documents

	listed in Ex. A to U.S.'s response to Martin intervenors Rule 34 requests; otherwise the motion is denied; U.S.'s motion under Rule 26 to declare that its deposition not be had is granted; Martin Intervenors' motion under Rule 37 to compel production is denied as set out; Martin intervenors motion under Rule 37 to compel further interrogatory answers from plaintiffs or to limit evidence is denied, subject to plaintiffs' disclosure by 9/1/85 of witnesses and documents they anticipate using at trial, to be followed by similar disclosure from defendants by 9/25/85; discovery cutoff date of 10/1/85 is established in this case, filed (POINTER); entered 7/8/85-cm-slm.
July 8, 1985	Answer of defendants Arrington and City of Birmingham to USA's complaint in intervention with counterclaim thereon, filed in this and 82-P-1852-S-cs-slm.
July 11, 1985	Transcript of proceedings had before Hon. Sam C. Pointer, Jr. on 7/3/85 in Birmingham, Alabama, filed-slm (Laura Nichols - Ct. Rptr.).
July 12, 1985	Motion of Charles E. Carlin to intervene in Wilks v. Arrington, with complaint in intervention thereon, filed-cs-slm—See order dated 8/9/85.
July 12, 1985	Order that paragraph 10 of 7/8/85 order is amended to reflect that the discovery cutoff in this case is 10/31/85, as orally ruled by the court during the status conference on 7/3/85, filed (POINTER); entered 7/15/85-cm-slm.
July 15, 1985	Counterclaims (Amendment) of defendants Arrington and City of Birmingham in this and 82-1852-S to complaint in intervention of USA, filed-cs-slm.

July 17, 1985	Answer of defendant intervenors Martin, et al to complaint in intervention of USA, with Counterclaim thereon, filed-cs-slm in this and 82-1852-S.
July 18, 1985	Motion of USA to dismiss counterclaim of Arrington and City of Birmingham, filed-cs-slm.
July 26, 1985	Motion of USA to dismiss amendment to counterclaims of defendants Arrington and City of Birmingham, filed in this and 82-1852-S-cs-slm.
Aug. 12, 1985	Order dated 8/9/85 that Charles Carlin's motion to intervene in 83-2116-S is granted as the *Wilks* will be involved in 1st trial; defendant to answer complaint in intervention within time required by law; filed (POINTER); entered 8/12/85-cm-slm.
Aug. 29, 1985	Answer of defendants Arrington and City of Birmingham to complaint in intervention of Charles Carlin, filed in this and 83-2116-S—cs-slm.
Sept. 3, 1985	Answer of defendant intervenors Martin, et al to complaint in intervention of Carlin, filed.
Sept. 12, 1985	Witness and exhibit lists of USA, filed-cs-slm.
Sept. 16, 1985	Motion of USA for pre-trial evidentiary ruling on burdens of proof at trial, filed-cs on brief-slm (del to SCP) - See order dated 9/2/85.
Sept. 19, 1985	Witness and exhibit list of plaintiffs, filed-cs-slm.
Sept. 24, 1985	Transcript of proceedings held on 9/17/85 before Hon. Sam C. Pointer, Jr.
Sept. 26, 1985	Order dated 9/25/85 that the motion by USA to compel production of documents by City of Birmingham and Arrington is granted; motion of USA to

	compel defendant-intervenors to provide responses to certain interrogatories is denied in part and granted in part as set out; motion of USA to compel defendant intervenors to produce documents is granted in part and denied in part as set out; motion of defendant-intervenors to have certain requests for admissions deemed admitted for judicial notice of certain fact and denied request to be treated as interrogatories is denied; joint motion of defendant-intervenors, City of Birmingham and Arrington to compel compliance with pretrial order entered on 7/8/85 is granted as set out; City of Birmingham to permit deposing of Fire Lieutenants Eugene Baldwin, Albert Isaac, Clavin Echols, Jackie Barton and Benjamin Garrett; for present purposes of preparing for trial, plaintiffs and USA to assume that they carry the burden of proof, filed (POINTER); entered 9/26/85-cm-slm.
Oct. 25, 1985	Motion of USA to set for hearing on 11/15/85 USA's motion for pretrial evidentiary ruling, filed-cs-slm (del to SCP) - See order dated 11/8/85.
Nov. 4, 1985	Transcript of proceedings had before Hon. Sam C. Pointer, Jr., on 10/31/85 in Birmingham, Alabama filed-slm (Rptr. - Michael Lowery/Tyler Tribble Eaton & Morgan.
Nov. 12, 1985	Order dated 11/8/85 that the joint motion of City of Birmingham, Arrington and defendant-intervenors to enlarge time for discovery is partially granted; time permitted for discovery for all parties is enlarged from 11/7/85 to 11/21/85; two motions by City of Birmingham and Arrington to compel further responses from USA and plaintiffs to second interrogatories is partially granted; USA and plaintiffs to answer

by 11/21/85 those questions put forth by the City of Birmingham and Arrington that pertain to individuals who are allegedly unqualified, or demonstrably better or less qualified; motion USA and plaintiffs for scheduling order is granted; motion by USA for sanctions against defendant intervenors is denied: motion by USA requesting a hearing on pretrial evidentiary ruling is denied, filed (POINTER); entered 11/12/85-cm-slm.

Nov. 14, 1985 — Order on 11/12/85 motion of plaintiffs that defendants Arrington and City of Birmingham and defendant intervenors are deemed to have admitted that a significant factor in selection of Lucius Thomas as civil engineer was race; such defendants are also deemed to have qualified this admission by asserting that the City believe it was required by the Decree to take race into consideration; unless withdrawn by 11/21/85, by an amended response to request for admissions, said defendants are also deemed to have admitted that a significant factor in selection of persons as set out was race, filed (POINTER); entered 11/14/85-cm-slm.

Nov. 21, 1985 — Motion of USA and plaintiffs to require defendant intervenors, Arrington and City of Birmingham to submit final witness list, filed-cs-slm (del to SCP) see order dated 12/9/85.

Nov. 21, 1985 — Answers (supplemental) of plaintiffs to City defendants' interrogatories, pursuant to 11/8/85 court order, filed-cs-slm.

Nov. 22, 1985 — Answers (supplemental response) of USA to second interrogatories of Arrington and City, filed-cs-slm.

Nov. 29, 1985 — Motion in limine of defendants Arrington and City of Birmingham and

	defendant intervenors to preclude plaintiffs and USA from offering testimony at trial re: post-promotional performance of black City employees whose promotions are challenged in this case, filed-cs-slm - See order dated 12/9/85.
Dec. 3, 1985	Motion in limine of USA to exclude certain testimony and exhibits listed in defendants joint witness and exhibit list, filed-cs-slm (del to SCP) - See order dated 12/9/85.
Dec. 4, 1985	Motion (joint) of defendants Arrington and City of Birmingham and defendant intervenors to strike Siskin, Dr. Montgomery Pereira and Martin Shanin from plaintiffs' joint witness list, filed-cs-slm (del to SCP).
Dec. 9, 1985	Order that pending motions of 11/22/85, 11/21/85, 12/3/85, 11/29/85, 11/25/85, 12/2/85 and 12/4/85 were ruled on at 12/5/85 conference and rulings may be found in transcript of that conference, filed (POINTER); entered 12/9/85-cm-slm.
Dec. 11, 1985	Transcript of proceedings (status conference) had before Hon. Sam C. Pointer, Jr. on 12/5/85-slm. (Rptr. - Gary Morgan/Tyler Tribble Eaton & Morgan).
Dec. 12, 1985	Witness list (joint/final) of plaintiffs and USA, filed-cs-slm.
Dec. 12, 1985	Exhibit list (amended joint) of plaintiffs and USA, filed-cs-slm.
Dec. 16, 1985	Submission of USA of proposed demonstrative evidence, with exhibits attached, filed-cs-slm.
Dec. 16, 1985	On trial before the Hon. Sam C. Pointer, Jr. on certain issues - certain stipulations of parties stated into the record - oral motion (renewed) of

United States to shift burden of proof entered - denied- written motion of defendant City of Birmingham to limit admissibility of exhibits #s 6, 7, & 8 filed ruling reserved - depositions of Lucius Thomas, Jr. & Richard E. Goodwin, Jr. taken by the United States filed - testimony of plaintiffs and United States - depositions of George G. Seibels, Jr., Howard Dwight Holsomback & Salley G. Willis taken by defendants filed - daily adj. rptrs. Morgan, Tribble, Nichols and Pritchett (of firm Tyler, Tribble) - 1pc (*excerpts of depositions of H. Dwight Holsomback 11/15/85; Richard Martin 11/16/82; Mayor Arrington 9/16-17/85; James W. Fields 11/18/85; Miriam Hall 1/19/84; O'Neal Gallant 6/18-21/85; John Lawrence Duncan 7/18/85 & 11/15/82; W. Gordon Graham 11/15/82/, 8/20-21/85 & 9/12-13/85; Hobson R. Riley, Jr. 9/18/85; Euel S. Laughlin 7/15-18/85; Ed Lamont 10/24/85).

Dec. 17, 1985 — Trial resumed - testimony of plaintiffs and United States resumed - transcript (2 vols. of proceedings 12/16/85 filed - transcript of morning proceedings of 12/17/85 filed - daily adj. rptrs, Robin, Morgan, Nichols & Pritchett -1pc.

Dec. 18, 1985 — Trial resumed - testimony of plaintiffs and United States resumed - transcript of afternoon proceedings of 12/17/85 filed - deposition of Peter Tyler taken by defendant intervenors filed - oral motion of plaintiffs to allow testimony of Dr. Sisken - granted over objection of defendant-intervenors - oral motion of defendant intervenors to strike certain testimony of Dr. Sisken - overruled - oral motion of defendant-intervenors to strike entire trial - overruled - daily adj. Hearing in chambers - proffer made by plaintiffs re McGuire - ruling

	made previously at bench stated into record - two exhibits (417 & 418) received & sealed - rptrs, Morgan, Tribble, Eaton, Nichols & Morgan - 1pc.
Dec. 18, 1985	Transcript of morning proceedings of 12/18/85 filed-1pc/slm (Vol. V).
Dec. 19, 1985	Trial resumed - transcript (vol. VI) of afternoon proceedings of 12/18 filed - testimony of plaintiffs & U.S. resumed - proffer of evidence re certain testimony of McKee made in chambers - objection sustained - transcript of proceedings in chambers evening of 12/18/85 filed & sealed per order of SCP - transcript (vol. VII) of proceedings morning of 12/19/85 filed - daily adj. rptrs, Tribble, Morgan, Nichols, Pritchett & Tribble - 1pc.
Dec. 20, 1985	Trial resumed - testimony of plaintiffs and U.S. resumed - plaintiffs and U.S. rest - depositions (2 vols.) of Cliff Reach taken by defendants filed - transcript (vol. VIII) of proceedings afternoon of Dec. 19, 1985 filed - oral motions of defendants City of Birmingham, et al and defendant intervenors for involuntary dismissal entered denied, subject to reconsideration at conclusion of all evidence - written motion of defendant Personnel Board for Rule 41(b) dismissal filed - granted - deposition of Sarah W. Naugher offered into evidence by defendants & received - defendants rests - proposed findings of fact prepared by defendants filed — rebuttal of plaintiffs in form of documents marked as exhibits & offered into evidence & received - closing arguments by counsel - proposed findings of defendants adopted by the Court subject to revisions and additions as dictated defendants adopted by the Court subject to revisions and additions as dictated

into the record by the Court - written judgment to be entered by the Court, rptrs, Tribble, Nichols, Morgan & Pritchett - 1pc.

Dec. 23, 1985 — Clerk's Court Minutes dated 12/20/85 that pursuant to findings of fact and conclusions of law proposed by defendants Arrington and City of Birmingham and defendant intervenors adopted by the Court and subject to the revisions and additions dictated into the record, a written judgment will be entered by the Court, filed; entered 12/23/85-cm-slm.

Dec. 23, 1985 — Transcript of proceedings had 12/20/85 before Hon. Sam C. Pointer, Jr., filed-slm (vol. IX and X).

Dec. 26, 1985 — Order (and Partial Final Judgment) dated 12/23/85 in accord with findings of fact and conclusions dictated and adopted in open court on 12/20/85, the Court finds for the defendants and against plaintiffs on claims in CV 83-P-2116-S, CV 82-P-0850-S and CV 82-P-1852-S as set out — claims of plaintiff intervenor USA re: Fire & Rescue Service and Engineering Department are dismissed with prejudice — court costs are taxed against private plaintiffs and USA as the Court may subsequently allocate; defendant and defendant intervenors are to file their bill of costs by 1/21/86; all claims for attorneys fees in these cases under 42:1988 and Title VII of Civil Rights Act of 1964, as amended, by defendants and defendant intervenors are denied; this judgment does not affect pending counterclaims against USA in *Wilks*, *Bennett* and *BACE* actions; pursuant to Rule 54(b) FRCP, the Court determines that there is no just reason for delay and expressly directs that judgment be entered with respect to the claims and parties

	described in paragraphs 2-7 of this order, filed (POINTER); entered 12/26/85-cm-slm.
Dec. 26, 1985	Motion of plaintiffs and USA to amend 12/26/85 judgment, filed-cs-slm. See order dated 1/6/86.
Jan. 7, 1986	Order dated 1/6/86 that the Court adopts as additional findings of fact the following numbered paragraphs listed in part I (Adtl Prop. Findings) of said motion: #1, 2, 3, 4, 5, 6, 7, 10, 15, 19, 20, 21 and 22; the Court amends it[s] findings of fact as previously adopted from the proposed findings of fact submitted by defendants to read as set out in this order; in other respects, motion of plaintiffs and USA is denied, filed (POINTER); entered 1/7/86-cm-slm.
Jan. 9, 1986	Motion (joint) of defendants Arrington and City of Birmingham and defendant intervenors to amend 1/7/86 order, filed-cs-slm — See order dated 2/11/86.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of Hamilton, Woods, Rogers, Pharris, Sulser, Vaughn, Keeling, Thomas, Smith, Courington and Bartlett filed in 82-P-1461-S, filed-cs-slm.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of Raymond Martin filed in 83-P-2680-S, filed-cs-slm.
Jan. 15, 1986	Answer of defendant City of Birmingham to complaint in intervention of Donald Vaughn filed in 82-P-1461-S-cs-slm.
Jan. 15, 1986	Answer of defendants Arrington and City of Birmingham to complaint in intervention of USA filed in 83-2680-S, with Counterclaim thereon, filed-cs-slm.

Jan. 21, 1986	Answer of defendant intervenors to complaint of intervention of Donald Vaughn, filed in this and 82-P-1461-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of Hamilton, filed in this and 82-P-1461-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of Raymond Martin, filed in this and 83-2680-S-cs-slm.
Jan. 21, 1986	Answer of defendant intervenors to complaint in intervention of USA, with Counterclaim thereon, filed in this and 83-2680-S-cs-slm.
Jan. 27, 1986	Motion of USA in this and 83-2580-S to dismiss counterclaims of Martin defendant intervenors, filed-cs-slm (del to SCP).
Feb. 11, 1986	Order that the motion of defendants and defendant intervenors filed 1/9/86 seeking amendment under Rule 52(b) of the Court's order of 1/7/86 is denied; the motion of plaintiffs and the USA to delay taxation of costs pending appeal is granted; filed (POINTER).
Feb. 11, 1986	Notice of appeal of plaintiffs, Robert K. Wilks, Ronnie J. Chambers, Carlice E. Payne, John E. Garvich, Jr., Robert Bruce Millsap, James W. Henson, Howard E. Pope, Charles E. Carlin, Floyd E. Click, James D. Morgan, Joel Alan Day, Gene E. Northington, Vincent Joseph Vella, Lane L. Denard, Kenneth O. Ware, and Birmingham Association of City Employees, from this court's orders of 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.
Feb. 11, 1986	Notice of appeal of plaintiff-intervenor, United States of America, from this court's orders entered 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.

Feb. 11, 1986	Motion of USA in this and 83-2680-S to dismiss counterclaims of Arrington and City of Birmingham, filed-cs-smc.
Feb. 18, 1986	Notice of appeal of defendants, Richard Arrington, Jr., and the City of Birmingham from this court's orders entered 12/26/85, 1/7/86, and 2/11/86, filed-cs-sjr.
Feb. 25, 1986	Notice of appeal of defendant-intervenors, Martin, Florence, McGruder, Coar, Thomas, and Howard from this court's order entered 12/26/85, 1/7/86 and 2/11/86, filed-cs-sjr.
Mar. 24, 1986	Motion of Martin defendant intervenors to consolidate or reassign 86-G-0325-S with 74-P-0017-S and 75-P-666-S, or in the alternative, with this action, filed-cs-smc.
Mar. 31, 1986	Motion of City of Birmingham, Arrington and Martin intervenors in this and related cases to compel USA to comply with City Decree etc., filed-cs-smc - See order dated 4/16/86.
April 17, 1986	Order dated 4/16/86 in this and related cases that the joint motion to compel by the City of Birmingham, et al and Martin, et al filed 4/2/86 is deferred and continued pending the resolution of the current cases on appeal, with the exception of the request made in the motion for additional time in which to provide detailed itemization of attorney's fees, which the Court grants; two motion to substitute Judson E. Tomlin, Jr. as counsel for officials of the Jefferson County Personnel Board are granted, filed (POINTER); entered 4/18/86-cm-smc.
June 6, 1986	Motion of Douglas McBee to intervene as party plaintiff, with proposed complaint in intervention (adoption of

	original complaint in Zannis) thereon, filed-cs-smc.
July 5, 1986	Stipulation of the parties to retain the record on appeal, filed-sjr (del SCP).
July 8, 1986	Certificate of readiness of the record on appeal mailed to Clerk-USCA; copy of transmittal letter mailed to attorneys of record-sjr.

In re: Birmingham Reverse Discrimination Employment Litigation (Eleventh Circuit), 86-7108

Sept. 4, 1986	Flg. Order DENYING appellant cross-appellee's motion to defer briefing without prejudice to their filing supplemental briefs after Supreme Court ruling in *Paradise & U.S.* v. *Prescott* and GRANTING an extension of 30 days in which to file their briefs. (FMJ).
Nov. 3, 1986	Flg. Order GRANTING appellee's motion for excess pages not to exceed 60 pages; DENYING motion of the Community Affairs Comm. to participate as Amicus and GRANTING appellees, City of Birmingham, et al an extension of time to file brief for ten days only. (JLE).
Dec. 9, 1986	Flg. Order DENYING appellee's motion for reconsideration as MOOT. JLE.
April 14, 1987	Flg. order that appellees James B. Johnson and the Personnel Board of Jefferson County, Alabama's motion to strike appellants-cross appellees Robert K. Wilks, et al reply brief is CARRIED WITH THE CASE. (GBT).
April 16, 1987	Flg. Order that Appellant-Cross appellee Wilks, et al and appellant U.S.A.'s motions for leave to file supplemental briefs are CARRIED WITH THE CASE. (GBT).

April 17, 1987	Flg. Order that the joint request of Appellee-Cross-Appellants Richard Arrington, Jr., et al. and Intervenors-Appellees-Cross-Appellants Martin, et al for leave to file supplemental briefs is CARRIED WITH THE CASE. (GBT).
Dec. 15, 1987	Flg. Order that appellees James B. Johnson and The Personnel Board of Jefferson County, Alabama's motion to strike appellants-cross-appellees Robert K. Wilks', et al reply brief is DENIED. Appellant'-cross-appellees Wilks', et al motion for leave to file supplemental brief is GRANTED. Appellant United States of America's Motion for leave to file supplemental brief is GRANTED. Appellees-cross-appellants Richard Arrington, Jr.'s et al and intervenors-appellees-cross appellants, Martin's et al joint request for leave to file supplemental briefs is GRANTED. (GBT).
Dec. 15, 1987	AFFIRMED in part, REVERSED in part and REMANDED.
Jan. 27, 1988	Flg. Order that appellee/cross-appellants John W. Martin, et al's motion for leave to supplement Petition for Rehearing & Suggestion of Rehearing In Banc is DENIED. GBT.
Jan. 27, 1988	Flg. Order GRANTING appellants-cross-appellees Robert K. Wilks, et al's motion to retax costs. and DENYING appellees James B. Johnson and The Personnel Board of Jefferson County's motion to join appellees-cross-appellants John W. Martin, et al's Suggestion of Rehearing In Banc. GBT.
Feb. 18, 1988	Flg. defendants-intervenors, appellee's-cross-appellant's motion to substitute counsel. (GRANTED 2/19/88 - lp).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A BENNETT; FLOYD E. CLICK; JAMES D. MORGAN; JOEL ALAN DAY; GENE E. NORTHINGTON; VINCENT JOSEPH VELLA; and, LANE L. DENARD,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; and, JEFFERSON COUNTY PERSONNEL BOARD,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

APPLICATION FOR
TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers 75-P-0666-S, 74-Z-17-S and 74-Z-12-S, and from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the Birmingham Fire Depart-

ment except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date.

Petitioners have heretofore filed their verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorneys certify that notice, by telephone, has been given to the office of the City Attorney for the City of Birmingham and the regular attorney for the Personnel Board defendants. Plaintiffs further state that the petitioners are in danger of suffering immediate and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioners further state that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioners only seek to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioners submit the verified Complaint sworn to by the plaintiffs and offer to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

Of Counsel:

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[Certificate of Service, dated April 14, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., *et al.*,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

ORDER

The court has considered the plaintiffs' application for a temporary restraining order and the arguments of all counsel related thereto. In the course of the hearing the court made known its view, in its role of supervising implementation of the consent decrees entered in CV 75-P-0666-S, that under § 24 of the consent decree regarding the Personnel Board certification should be made of those entitled to be certified under state law with supplementation of additional qualified persons as needed to enable the City of Birmingham to meet its responsibilities under its Consent Decree rather than to displace any persons from the certification list. Given this interpretation, the city defendants acknowledged that no appointments would be made from the current certification list and the defendant Personnel Board acknowledged that in due course a new certification list would be submitted consistent with this interpretation. These responses by the defendants render any restraining order unnecessary, without regard to the merits of the other issues between the parties. The application for the temporary restraining order is, on this basis, DENIED, without prejudice to the rights of the parties to bring this cause again before the court for hearing at such time as the new certification is made by the Personnel Board.

This the 14th day of April, 1982, at 4:30 p.m.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*,

Defendants.

CIVIL ACTION NO.
CV 82-P-0850-S

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers 75-P-0666-S, 74-Z-17-S and 74-Z-12-S, from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the Birmingham Fire Department except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date, and from making a certification or appointment for promotion on the basis of race pursuant to the Request for Certification attached hereto as Exhibit A.

Petitioners have heretofore filed their verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorneys certify that notice, by telephone, has been given to the office of the attorney for the City of Birmingham and the attorney for the Personnel Board defendants. Plaintiffs further state that the petitioners are in danger of suffering immediate

and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioners further state that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioners only seek to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioners submit the verified Complaint sworn to by the plaintiffs, the Affidavit of Billy Gray, and offer to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

Of Counsel:

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(205) 322-6617

[Certificate of Service, dated April 19, 1982, and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

AFFIDAVIT OF O. NEAL GALLANT

1. I am the Fire Chief of the City of Birmingham and was appointed to that office in June, 1980.

2. I have been an employee of the Fire Department of the City of Birmingham since 1943 during which time I served as a Firefighter until 1949 when I was promoted to Fire Lieutenant; to Captain in 1952; to Battalion Chief in 1955; and to Assistant Chief in 1961.

3. During my nineteen years as Assistant Chief I was in charge of personnel matters for the Fire Department which charge included the requisitioning of personnel from the Jefferson County Personnel Board to fill existing vacancies in the Department, the interviewing and background checks of persons certified as eligible by the Board, and the selection of that person(s) deemed by me to be best qualified to fill the vacancy, and the submission of same to the Fire Chief for appointment.

4. As Fire Chief I am aware of the provisions of the Consent Decree entered by this Court on August 21, 1981 in Civil Action No. CV-75-P-0666-S as those provisions pertain to the City Fire Department.

5. There are 92 persons presently in the Department occupying the position of Fire Lieutenant, all of whom are white males.

6. During my 39 years' service in the Department there has never been a black person appointed to or holding the position of Fire Lieutenant in the Department.

7. As to Personnel Board certifications of eligibles for, and promotions made by the city to, the position of Fire Lieutenant in the period from August 3, 1981 to the time of the pending certification placed at issue by the plaintiffs in the within case, the Affidavit of Billy Gray herein submitted on plaintiffs' behalf is confusing. The facts are as follows:

a. From an August 3, 1981 certification of 5 eligibles, the city, on August 22, 1981 promoted 3 to Fire Lieutenant, each of whom is a white male. (Exhibit 1 attached)

b. From a November 16, 1981 certification of 4 eligibles the city promoted 2 to Fire Lieutenant, one on November 28 and the other on December 12, 1981, each of whom is a white male. (Exhibit 2 attached)

c. Thus, since the entry on August 21, 1981 of the aforesaid Consent Decree, the city has made 5 promotions to Fire Lieutenant, all of whom are white.

8. On the April 19, 1982 certification of eligibles, at issue herein, I personally interviewed each of the employees thereon listed and have checked their work records and reviewed their personnel files in the Department. There are 5 blacks on the certification, listed thereon as number 9. through 13. I conclude that 4 of the black eligibles, numbers 9., 10., 11., and 13., are competent and qualified to be promoted to and occupy the position of Fire Lieutenant, and that none of the whites on the list are demonstrably better qualified than these 4 blacks. It is my further judgment that the city's promotion of these 4 blacks will in no way lessen the efficiency of the Department nor will their promotions endanger the safety of the public.

The April 19, 1982 certification list is attached as Exhibit 3.

9. In relation to Billy Gray's relative evaluation of the certified blacks and whites as stated in his herein submitted Af-

fidavit, Billy Gray's duties in the Fire Department do not include those of evaluating individuals on certification lists and, in my opinion, he is not qualified to make judgments as to comparative qualifications of eligibles.

/s/ O. Neal Gallant
O. Neal Gallant
Fire Chief, City of Birmingham

Sworn to and subscribed before me,
this 22nd day of April, 1982.

/s/ Notary Public
Notary Public

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA McGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny and otherwise respond as follows:

1. Deny

2 through 7. Admit.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

9. Admit that the five persons named are black male firefighter employees of the City of Birmingham who have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. As to all other averments the defendants are without knowledge or information sufficient to form a belief.

10. Admit the averment of the first sentence of this paragraph, but otherwise deny.

11. Admit the averment of the first sentence of this paragraph, but otherwise deny.

12. Deny.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of this paragraph.

14 through 21. Deny.

22. To the extent this averment is one of fact, deny.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FOURTH AFFIRMATIVE DEFENSE

This action is barred by *res judicata* in that the claim or claims herein asserted were finally adjudicated by judgment of this Court entered in the case of *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74H17S, on August 18, 1981.

FIFTH AFFIRMATIVE DEFENSE

This action is barred by the laches of the plaintiffs.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the

defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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By /s/ Attorneys For Defendants
Attorneys for Defendants

April 22, 1982

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

MOTION TO INTERVENE AS PARTIES DEFENDANT

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to intervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that certain provisions of a consent judgment entered by this Court in *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74H17S, are illegal and void and pray that their enforcement be enjoined.

2. The complaint in this case also alleges that the defendants in the case of *John W. Martin, et al. v. City of Birmingham, et al.* are not properly implementing the consent decree in that case.

3. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* and are entitled to enjoy the benefits of the consent judgment therein entered.

4. The consent judgment in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* is valid on its face and is not subject to collateral attack in another proceeding.

5. The interest of the movants, both on their own behalf and on behalf of others, in the integrity and proper implementation of the consent judgment in the case of *John W. Martin, et al. v. City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability of the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgment in *John W. Martin, et al. v. City of Birmingham, et al.* and none can adequately represent in this action the interest of the movants.

6. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have common questions of both law and fact with those defenses assertable by the present defendants.

A proposed answer of the movants is attached.

Movants request oral argument on this motion.

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Counsel for Movants

By /s/ Susan W. Reeves

April 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-0850-S

NOTICE OF APPEAL

Notice is hereby given that plaintiffs hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order denying injunctory relief entered by the District Court on April 23, 1982.

/s/ John S. Foster
JOHN S. FOSTER

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

Attorneys for Plaintiffs

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT; FLOYD E. CLICK; JAMES D. MORGAN; JOEL ALAN DAY; GENE E. NORTHINGTON; VINCENT JOSEPH VELLA; AND LANE L. DENARD, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; and, JEFFERSON COUNTY PERSONNEL BOARD, *Defendants.*	CIVIL ACTION NO. CV 82-P-0830-S

Before:

Honorable Sam C. Pointer, Jr., Presiding Judge

Birmingham, Alabama - Friday, April 23, 1982, 9:30 a.m.

APPEARANCES:

For the Plaintiffs:

William W. Conwell, Esq.
Raymond P. Fitzpatrick, Jr., Esq.

[Page 2]

APPEARANCES (CONTINUED):

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Michael L. Hall, Esq.
Hubert A. Grissom, Jr., Esq.
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For the Plaintiffs in the Original Action:

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For Richard Arrington, Jr. and City of Birmingham:

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[Page 2-A]

INDEX

MIRIAM HALL

Direct Examination by Mr. Fitzpatrick

11 - 22

Cross Examination by Mr. Whiteside

23 - 24

Cross Examination by Mr. Alexander

25

Cross Examination by Ms. Reeves

26

Redirect Examination by Mr. Fitzpatrick

26 - 27

EXHIBITS

PLAINTIFFS EXHIBITS:		MARKED	RECEIVED
Exhibit 1	Validity Study and Examiner's Manual	13	16
Exhibit 2	Eligible Register	19	19
DEFENDANTS' EXHIBITS:		MARKED	RECEIVED
Exhibit 1	Compilation of Scores	24	26

[Page 3]

PROCEEDINGS

THE COURT: 82-850, Bennett and others versus Arrington and others. This matter is set before the Court at this time on the Plaintiffs' application for a temporary restraining order. There is before the Court a motion by certain individuals to intervene as Parties Defendant. It is my view that that motion is due to be granted under Rule 24-B as it relates to that aspect of the complaint that would seek to invalidate or void portions of the consent decrees. There is another aspect of the complaint really relating to the application and whether there has been some inpermissable [sic] certification of unqualified candidates. As I view it, that is not a matter which the Petitioners for Intervention would have an interest in, none of them, as I believe it to be correct, being involved as fire officers or the like.

MS. REEVES: No, sir. Charles Howard was an applicant with the Fire Department but he failed to pass the fire test and under the provisions the orders were set, if you failed to pass the test, you would not get in. If you couldn't meet the time service requirement to be eligible for promotion, it would have its residual effect.

MR. FITZPATRICK: Your Honor, may I make one comment?

[Page 4]

Regarding Charles Howard, I do note that the petition is filed by the individuals and not by the classes. Charles Howard was the only one of the seven individuals who related to the Fire Department. In the consent decree, Charles Howard accepted backpay and expressly waived all other relief. That is in Paragraph 33-F of the City Decree.

THE COURT: The ruling of the Court is that under 24-B, these Plaintiffs may be allowed and are allowed to intervene as Parties Defendant for the limited purpose of opposing that portion of the requested relief that would seek to invalidate or void portions of the consent decrees.

Now, first, I would like to inquire whether there is any request by the Plaintiff and whether there is agreement or waiver by the Defendants for the application for a temporary restraining order to be taken as a request for preliminary injunction. Has that matter been considered?

MR. FITZPATRICK: Your Honor, as to the factual issues — as to the legal issues, I have no objection to it being considered an application for preliminary injunction. As to the factual issues, I have had the limited discovery of being able to obtain documents from the Personnel Board. I have not been able to interview —

[Page 5]

I have been expressly told not to interview any of the Personnel Board employees who took part in the compiling of the Personnel Board's documents, so as to the legal issues, it would be our position that a — we have no objection to it being considered an application for preliminary injunction. As to the factual issues, we would prefer that it be considered an application for temporary restraining order, and I believe the Court could sever the two portions of the complaint. Thank you.

MR. ALEXANDER: Your Honor, on behalf of the City, we take the position that the matter ought to be considered simply as an application for a TRO. That — we would also take the further position that it could be done so on the basis of affidavits submitted to the Court and arguments of counsel. We are certainly not in a position to try a preliminary injunction this morning.

THE COURT: All right. Of course, absent consent by the Defendants, the rules of procedure provide for a period of notice and unless that be waived, it can only be heard as an application for TRO. Of course, this will mean, which is the reason in part for my suggestion, that I presumably will need to reset the case for an additional hearing on a preliminary injunction.

[Page 6]

That, however, is the right of the parties to insist upon. All right.

What does the Plaintiff present then on its application for temporary restraining order?

MR. FITZPATRICK: Your Honor, we would first ask the Court to take judicial notice of the prior cases — of the record in 75-P-0666-S, 74-Z-12-S, and I believe the case number in the third case was 74-Z-18-S.

MS. REEVES: 17.

MR. FITZPATRICK: 17-S. Thank you. The consolidated cases which have been styled U.S.A. vs. Jefferson County, et al. We would ask the Court to take judicial notice of that. We didn't see the need for subpoenaing the Clerk of the Court.

THE COURT: The Court will take judicial notice of those.

MR. FITZPATRICK: Thank you, Your Honor. Second, we submit the affidavits of Billy Gray, which was filed with the Court on Monday. We have submitted a second affidavit of Billy Gray, and we submit the affidavits of Mr. Miskelly, Mr. Sorrell, Mr. Wint, Mr. Click, and the verified complaint.

THE COURT: Does the Clerk have those?

THE CLERK: No, sir.

MR. FITZPATRICK: I submitted them to your secretary

[Page 7]

with the brief which she informed me she would deliver to you before you came on the Bench this morning.

THE COURT: I have been involved in another matter this morning.

MR. FITZPATRICK: I am sorry. Yes, sir, we did file a brief and we wanted to make that available to you before you came on the Bench this morning.

THE COURT: I do have Plaintiffs' brief and the affidavits of Click, second affidavit of Gray, Wint, Sorrell, and Miskelly, as well as the original affidavit from Mr. Gray.

MR. FITZPATRICK: And we also submit the verified complaint. We have been unable — we have received documents from the Personnel Board pursuant to a request for production. We would — we have subpoenaed Miriam Hall of the Personnel Board and we would request the opportunity for a short examination.

THE COURT: Relating to the grading or the —

MR. FITZPATRICK: Relating to whether the test has been found to be job-related so as to discuss in the brief — that would then bring in the provisions of Paragraph Two of the City Decree whereby the Plaintiffs have been demonstrated to possess superior qualifications for the Fire Lieutenant job. Again, that was discussed in our brief, and then also relating to the question of

[Page 8]

where the pass point on the exam was set and its impact upon the Plaintiffs.

THE COURT: Well, I take it you are referring to probably no more than five to ten minutes of examination?

MR. FITZPATRICK: I would hope so, yes, sir. Then we do submit our brief which discusses the factual issues and also the legal issues. It brings to the Court's attention authorities which we believe show that collateral attack is proper in this case, and one other case which is not in the brief that I would like to cite to the Court is Jackson vs. Desoto Harris School Board, 585 Fed. 2d 726, 5th Circuit, 1978, where the Court discussed the power of the trial Court to reexamine its prior decision based upon intervening case law, especially when constitutional issues are involved.

I would also like to bring to the Court's attention for the record the portions of the Assistant Attorney General's comments which were taken from the hearings before the House Subcommittee on employment opportunities, to the Committee

of Education and Labor which took place, I believe, on the 23rd of September, 1981. We adopt those comments as argument, and a copy of the comments is attached to the affidavit of Gray. I also have a copy of the transcript in toto if the Court

[Page 9]

wishes to receive it.

THE COURT: I wouldn't think the transcript in total is needed and it is attached.

MR. FITZPATRICK: Yes, sir.

THE COURT: To the affidavit of Mr. Gray.

MR. FITZPATRICK: Your Honor, concerning the fact issues, if I may address them: First of all, the first fact issue which is discussed in my brief —

THE COURT: Let me find out, would that be the basis on what you will be submitting on application for the TRO?

MR. FITZPATRICK: I submit both on the legal issues and on the factual issues, yes, sir.

THE COURT: Let me find out what the Defendants will be submitting on in the way of affidavits or other evidence.

MR. FITZPATRICK: What I have submitted so far plus the testimony. Thank you.

MR. ALEXANDER: Your Honor, for Defendants Arrington and Birmingham, we have filed yesterday the affidavit of Neal Gallant, the City's Fire Chief, describing the selection process. We want to be heard in oral argument in opposition for the TRO.

THE COURT: I have not seen that affidavit and —

MR. ALEXANDER: I want to correct that immediately.

[Page 10]

THE COURT: Has a copy of this been provided to the —

MR. FITZPATRICK: Yes, sir, I just received that.

MR. WHITESIDE: Your Honor, for the Personnel Board, although we maintain that the Fire Lieutenant's Exam is job-related and followed the guidelines, the testing guidelines, we feel that we have not completed our study yet; that we would want to administer the Fire Lieutenant's Examination several times before we present it to the Court. The evidence — the validity we are quite concerned about a premature ruling on evidence, so we would oppose the attempt for that. We do not plan to present any other evidence, unless Ms. Hall is called and then we would like to follow-up with that.

THE COURT: Do the Intervening Defendants plan to present any evidence?

MS. REEVES: No, sir, but we would like to be heard on the oral argument.

THE COURT: All right. The Court will permit limited examination of Ms. Hall with respect to the cutoff score utilized and simply the status of validation. At this point the Court would not anticipate certainly making a ruling on the validity of that test and would certainly not be in a position to do so at this point. You may, however, call Ms. Hall.

[Page 11]

MR. FITZPATRICK: Ms. Hall, please.

MIRIAM HALL,
was sworn and testified as follows:

THE CLERK: State your name for the record.

THE WITNESS: Miriam Hall.

THE CLERK: State where you live.

THE WITNESS: 2713 Wincrest Circle in Gardendale, Alabama.

DIRECT EXAMINATION

BY MR. FITZPATRICK:

Q. Where are you employed, Ms. Hall?

A. Jefferson County Personnel Board.

Q. What is your classification with the Personnel Board?

A. Chief Examiner.

Q. Will you outline your responsibilities?

THE COURT: That is not necessary. Let's just move right on to the heart of the question.

MR. FITZPATRICK: I am trying to ascertain whether she is qualified in the field of psychometrics.

Q. (By Mr. Fitzpatrick) Do you have any certifications or background in the field of psychometrics?

[Page 12]

A. Yes, I do.

Q. Okay. Can you outline them very briefly for the Court?

A. Well, of course, working for the Personnel Board for 13 years, I have had job-related training as well as college course work in statistics.

Q. Are you familiar with the guidelines issued by the Department of Justice and the EEOC regarding the processes by which examinations which the Personnel Board administers may be validated and ascertained to be job-related?

A. Yes.

Q. Pursuant to the subpoena which was issued by the Clerk in this case, there was a request to produce documents. Have you brought the documents with you today?

A. Yes, sir. It was my understanding that you had been provided those documents already.

Q. I have been provided a copy of a portion — of the examiner's manual. Can you identify this (indicating)?

A. Yes. This was the Manual at the stage that our attorney came to the office to pick up some material that we had ready. This is a portion of it. Do you need a —

MR. FITZPATRICK: Will you identify it?

MR. WHITESIDE: This is not the complete copy.

[Page 13]

THE WITNESS: Do you want me to give him a complete copy?

THE CLERK: Plaintiffs' Exhibit Number 1 marked for identification.

(Plaintiffs' Exhibit Number 1 was marked for identification.)

Q. (By Mr. Fitzpatrick) Ms. Hall, can you identify what has been marked as Plaintiffs' Exhibit Number 1?

A. Yes.

Q. And what is it, please, ma'am?

A. The first document is the Personnel Board of Jefferson County Content Validity Study for the Classification of Fire Lieutenant, 1981. The second is the Examiner's Manual, Selection Device Development, Administration and Data Analysis, Fire Lieutenant Classification, 1981.

Q. Thank you. Were these documents prepared under your direction and guidance?

A. Yes, sir, they were.

Q. And under the direction and guidance of Mr. Curtin?

A. Yes.

Q. What do these documents — what is the bottom line intent of these documents?

A. Well, it is documentation of the job-relatedness of the examination.

[Page 14]

Q. And do these relate to the examinations upon which the Personnel Board has on this past Monday certified candidates for the City of Birmingham for the classification of Fire Lieutenant?

A. That is correct.

Q. In this document, is there a conclusion made as to whether or not the examination was job-related?

A. Yes.

Q. What is that conclusion?

A. Well, the conclusion is that the examination is job-related based on the subject matter experts' advice to us in ratings that they did for us in the study.

Q. Who are the experts?

THE COURT: Wouldn't that be included in the study?

MR. FITZPATRICK: Yes, sir.

Q. (By Mr. Fitzpatrick) Was there a conclusion made that the test was highly reliable for both blacks and whites?

A. Yes.

Q. Both as to minimum qualifications and for rank order, for rank order qualifications?

A. For rank order qualifications, yes.

Q. Ms. Hall, as a part of the examination, was there a separate test or separate portion of the test given which involved hydraulics?

[Page 15]

A. Yes, sir.

Q. Why was this separate examination given?

A. Well, it really is not considered a separate examination. Hydraulics is definitely a part of the fire-fighting job.

Q. Was it considered by the examiners that hydraulics was one of the closest situations that they could present to the examinees on paper to test their knowledge and ability to perform the duties of a Fire Lieutenant?

A. Right.

Q. Was there any finding made that — as to how the blacks performed on the hydraulics examination as related to how they performed on the examination in chief?

A. Well, I believe I noted on my examiner's sheet that those who scored well on the written examination also scored well on the hydraulics, and there was a correlation run.

Q. Were there blacks who scored well on the written examination?

A. Yes.

MR. FITZPATRICK: We offer Plaintiffs' Exhibit 1.

MR. WHITESIDE: Your Honor, I am not sure why it is being offered. I assume that you are not going to rule on any validity of the examination.

[Page 16]

THE COURT: I certainly do not expect to and certainly not at this stage of the case. Whether that might be appropriate in some way in further proceedings in this case at a later time, I would reserve judgment.

MR. WHITESIDE: With that, we won't object to it.

THE COURT: Exhibit 1 is received.

(Plaintiffs' Exhibit 1 was received in evidence.)

Q. (By Mr. Fitzpatrick) Ms. Hall, what are the factors that the Board employs in setting the pass point?

A. Well, we do a compilation of the test statistics. We consider how well the group as a whole did on the examination.

Q. And are those compilations and studies included in Plaintiffs' Exhibit 1?

A. Yes, but there are other factors as well.

Q. Is it not — is it true that pass points are normally set between 50 and 70 percent of the number of correct answers, number of correct answers on the raw score?

A. Not in our system.

Q. Do you know what the percentage of correct answers was set at in setting the pass point in the present Fire Lieutenant Examination on the pass —

A. I am sorry. I missed part of it. I want to be sure I understand the question.

[Page 17]

Q. Okay. How many questions were there on the January 26th Fire Lieutenant's Examination?

A. After review, there were 218 that were scored.

Q. 218. How many correct answers were necessary to pass the exam?

A. Passing point was set at 108 correct answers.

Q. 108?

A. Uh-huh (indicated yes.)

Q. So do you know what percentage - I don't have my calculator here - 108 is of 218? In other words, what percentage of correct answers did the examinee have to have in order to —

A. In this case, they would have answered half of the examination.

Q. 50 percent?

A. Uh-huh (indicated yes.)

Q. Okay. Ms. Hall, is it not a fact that the pass point is usually set somewhere between 50 and 70 percent?

A. Not necessarily. There are a number of factors that enter into the setting of passing point.

Q. If the pass point has been set at 70 percent of raw score, then how many points — how many correct answers would one have to have had in order to pass the exam?

A. Well, can you multiply 70 times 218 for me?

[Page 18]

Q. I will get right to the point. In the — in Plaintiffs' Exhibit 1, there is a finding concerning why the pass point was set at 108. Can you read that from my copy, please?

A. Okay.

THE COURT: What page?

MR. FITZPATRICK: I don't know.

THE COURT: What segment of the study?

THE WITNESS: It is the segment of the Examiner's Manual on the setting of passing points. It is towards the back.

THE COURT: Go ahead.

Q. (By Mr. Fitzpatrick) Okay. Go ahead.

THE COURT: I found the page.

MR. FITZPATRICK: It is the handwritten page.

A. The portion you have asked me to read is, "A score of 108 provides a register of eligibles for each participating jurisdiction and a suitable register of black candidates for Birmingham in order to comply with the provisions of the consent decree. All candidates will have answered at least half of the examination correctly."

Q. (By Mr. Fitzpatrick) Was the pass point set at 108 simply because of the consent decree?

A. No.

[Page 19]

Q. What other factors entered into that?

A. Well, I think we also have said that we have other jurisdictions besides the City of Birmingham under the system; the City of Hueytown, for example.

Q. Ms. Hall — excuse me. Go ahead.

A. Expected to fill a vacancy.

Q. Okay.

A. Or one of the smaller jurisdictions expected to fill a vacancy.

THE CLERK: Plaintiffs' Exhibit Number 2 marked for identification.

(Plaintiffs' Exhibit Number 2 was marked for identification.)

Q. (By Mr. Fitzpatrick) Would you identify what has been marked as Plaintiffs' Exhibit Number 2 for identification?

A. This is the Eligible Register established for Fire Lieutenant on 1-26 — based on the examination of 1-26-82 and approved 3-23-82.

MR. FITZPATRICK: We offer Plaintiffs' Exhibit 2.

THE COURT: Received.

(Plaintiffs' Exhibit Number 2 was received in evidence.)

Q. (By Mr. Fitzpatrick) Ms. Hall, do you know what the score of — did you say it was Hueytown that you had to certify people for?

[Page 20]

A. I am — hold on a second. I believe it was the City of Irondale.

Q. Three people were certified from Irondale. What were the test scores of the three people from Irondale?

A. The range of scores for the City of Irondale was 109 to 156.

Q. So that means all three people who were certified from Irondale either had 108 or 109?

A. Uh-huh (indicated yes.)

Q. Ms. Hall, is it normal to have 91.3 percent of the people who took the exam pass?

A. Well, I don't know what "normal" is, but every examination is considered separately. We establish a passing point based on the needs of our service and the overall examination statistics and results.

Q. In comparison to past examinations, was the pass point set at a low point on this examination?

A. In comparison to Fire Lieutenant Examinations?

Q. Yes, ma'am.

A. It was higher than last year's passing point.

Q. Well, is Fire Lieutenant a position which has a high turnover rate?

A. No.

Q. Is Fire Lieutenant a position which has a high waiver rate?

[Page 21]

A. No.

Q. Okay. How many positions did the City of Birmingham claim it would need to fill in the upcoming year?

A. I don't know that they made a claim.

Q. Did you have an expectation as to how many they would need to fill?

A. We usually make an estimate on our sheets.

Q. What was your estimate for this year?

A. I don't really remember. If you have it there, I will be glad to read it for you.

Q. I don't know where it would be.

A. We made an estimate. Seems like —

Q. Would it be in Plaintiffs' Exhibit 1?

A. Yes, it is. Perhaps ten. I believe ten was the figure last year.

Q. Ms. Hall, in determining whether the examination was job-related for both minimum qualifications and rank order determination, as far as determining the relative qualifications of the examinees, were the Department of Justice and EEOC guidelines employed?

A. The consent decree stipulated what the requirement would be.

Q. Were they employed?

A. And those were employed, yes.

Q. They were determined to be job-related?

[Page 22]

A. We did not sample that because we had no alternative.

Q. I don't understand your answer. Could you explain?

A. I am telling you that we were told — we agreed in the consent decree that the requirements would be what they were on the announcement.

Q. I am just not following that.

A. You are talking about the in-grade time and that was specified in the consent decree.

Q. I understand that. I am saying employing the Department of Justice guidelines and the EEOC guidelines and in determining whether the examination was job-related, did you employ those guidelines and then determine that the exam was job-related? Yes or no.

A. Yes.

Q. Okay. So is it your conclusion and testimony that if somebody scored higher on the examination than another person, they have been demonstrated to possess a superior qualification to perform the job of a Fire Lieutenant as measured by a job-related examination?

A. Yes, I would say so.

MR. FITZPATRICK: Thank you.

THE COURT: Any examination?

MR. WHITESIDE: Yes, Your Honor.

[Page 23]

CROSS EXAMINATION

BY MR. WHITESIDE:

Q. Ms. Hall, have you completed your validation efforts?

A. Well, it is a difficult thing to pronounce validity on any examination and this examination had been administered the one time.

Q. Are you continuing to try to validate the test?

A. We will continue. Yes, it is a validating process always.

Q. Ms. Hall, when you decided to set the passing point for the Fire Lieutenant Examination, did you before setting the passing point review the distribution of the test scores?

A. Certainly.

Q. And did you review the statistical analyses that you had performed and analysis concerning reliability and the analysis concerning the hydraulics correlation of the written test?

A. Yes.

Q. Did you review the number of anticipated vacancies for the job?

A. Yes.

Q. Did you review the level of difficulty of this particular test which was administered in 1982 with

[Page 24]

previous tests administered for Fire Lieutenants?

A. Yes, that is all part of the system.

Q. Did you also review the consent decree to determine what goals would be necessary in doing that?

A. Right.

Q. And as a result of making that review, did you reach a passing point that would have an implied level of minimum competency?

A. Yes.

Q. And is that a standard practice the Board follows?

A. Yes.

Q. With regard to the test, the Fire Lieutenant's Test you gave in 1982, was it a different test than the previous test?

A. Yes.

Q. And in the particular test, the one that was administered in 1982, did you require more correct answers on this test than you had in previous tests?

A. Yes.

MR. WHITESIDE: That's all.

THE CLERK: Defendants' Exhibit Number 1.

(Defendants' Exhibit Number 1
was marked for identification.)

[Page 25]

CROSS EXAMINATION

BY MR. ALEXANDER:

Q. Ms. Hall, let me show you what has been marked for identification as Defendant City of Birmingham Exhibit 1. Do you recognize that, please, ma'am?

A. Yes.

Q. Could you tell the Court what that is?

A. It is a compilation of the scores of the Fire Lieutenant's Examination and contains the raw score of each individual in the City of Birmingham, the raw score, rank, the converted score, the seniority points, the final score and the final rank.

Q. This lists each individual who took the examination in January and the second column is in fact the number of correct answers out of the 200 odd you have testified to?

A. That is correct.

Q. Would it be your judgment, ma'am, that there would be a significant performance difference between a raw score 168 and a raw score 169?

A. No. There is always some measurement in an examination.

MR. ALEXANDER: The City offers this Exhibit 1.

THE COURT: Received. Anything else?

(No response.)

[Page 26]

(Defendants' Exhibit Number 1 was received in evidence.)

THE COURT: You can step down. Thank you.

MR. FITZPATRICK: I have one further question.

MS. REEVES: Your Honor, may I be allowed to ask questions of Ms. Hall?

THE COURT: Surely.

CROSS EXAMINATION

BY MS. REEVES:

Q. Ms. Hall, do you know whether or not the test has a disproportionate adverse impact upon white applicants who are taking the test or —

A. No, it does not.

MS. REEVES: Thank you.

REDIRECT EXAMINATION

BY MR. FITZPATRICK:

Q. Does the exam have a disproportionate impact upon blacks?

A. No.

Q. Would a score of 168 be - how do they phrase it - a significantly different score than 180?

A. Yes.

Q. Would a person who scored 180 be demonstrably

[Page 27]

better qualified for the job than a person who scored 168?

A. He would have somewhat more job-related knowledge than the person who scored 168.

Q. So if — was the second — if Defendants' Exhibit 1 shows that Plaintiff Floyd Click scored 180 on the exam then he is demonstrably better qualified for the position of Fire Lieutenant than the 23rd person which is Mr. J. E. Lassetter who scored 168?

A. The answer that I gave you applies.

Q. Excuse me.

A. He has somewhat more job knowledge than the person who scored 168.

Q. And in your opinion, he has been shown to have superior qualifications for the position?

A. On our exam which is job-related, yes.

MR. FITZPATRICK: Thank you.

THE COURT: All right. You can step down. Thank you.

(Witness excused.)

THE COURT: Before I hear oral argument, I am going to take a short recess so that I may read the affidavits that have been submitted and such perusal of the exhibits as I think will be helpful in order to better understand the nature of the argument. Let's

[Page 28]

take a recess at least initially for about 20 minutes and see if that is enough.

(Break held.)

THE COURT: All right. Oral argument on behalf of the Plaintiffs. In view of the brief, I would suspect you not to be unduly repetitive.

MR. FITZPATRICK: If the Court has had an opportunity to review the brief, I will not then recite it to the Court.

First of all, the evidence clearly shows that the three people who were promoted last August were promoted on the 12th. There is no evidence to the contrary. We have — they were offered the positions. They accepted the positions and they assumed the duties. I have got some real problems with that in that the — when the City requested a certification, they said that five have been appointed since the decrees were entered. I think it speaks for itself, Your Honor.

As far as the validity of the exam, the evidence before the Court clearly shows that the examination was job-related and

was validated according to applicable regulation, and the Plaintiffs are shown by the exhibits to demonstrate superior qualifications.

THE COURT: All the Plaintiffs?

MR. FITZPATRICK: I will let those documents speak

[Page 29]

for themselves, Your Honor. I received them yesterday and they are interesting. I will say that. I do think that the seniority — the application of the seniority points is a valid use of job-related criteria to rank them according to their relative qualifications. In conjunction with the examination under American Tobacco vs. Patterson, they have the — I am the Plaintiff here, but another party opposing a seniority system would have to show that it is — that the use of those seniority points is for the intentional purpose of discriminating against blacks.

THE COURT: I think that is apples and oranges to some degree because the position you are stressing here is that under the terms of the decrees, some or all of the black applicants either are not qualified or are demonstrably shown to be less qualified than whites. The mere fact that you may consider in a seniority or merit system service would not necessarily reflect lack of qualifications or less qualifications by someone who had fewer years.

MR. FITZPATRICK: At any rate, I think the evidence does indicate that at least some of the Plaintiffs are — have been demonstrated and the evidence is uncontradicted at least, especially as to Mr. Click, that he possesses superior qualifications based upon job-related

[Page 30]

examinations than any of the black persons. The evidence is also uncontradicted that Mr. Click has been told by the Chief speaking for the City that he will not get a position, even though he has been certified, because of race. The interview process was really a — just a farce as far as he was concerned. The affidavit speaks for itself.

THE COURT: Let me ask you this —

MR. FITZPATRICK: Yes, sir.

THE COURT: Assuming the Court agrees with you that three of the previously appointed five individuals who are white were appointed prior to the entry of the decree, nevertheless there would be two whites appointed after the decree and there would be some whites being appointed by your approach from this certification; would it not?

MR. FITZPATRICK: I don't quite understand your question. I think what you are saying is: Can the City go ahead and appoint two blacks, even if two whites have been —

THE COURT: Not only two but you are talking about six additional appointments at this point.

MR. FITZPATRICK: Yes, sir.

THE COURT: If you take that six plus the two that you would acknowledge were appointed after the entry of

[Page 31]

the decree, that is a total of eight appointments made after entry of the decree.

MR. FITZPATRICK: So could not four have been black? Well, Your Honor, I, first of all, believe that a certification made pursuant to an erroneous request which has a false statement on its face should be enjoined and they should go back through the request process again and make a new certification and based upon true facts —

THE COURT: Well, it would result in the same situation basically, wouldn't it?

MR. FITZPATRICK: I don't know. I have heard rumors. I have heard that the City is not going to go ahead and appoint five blacks. I have heard they are going to appoint less. I have heard they are going to reject some.

THE COURT: Go ahead.

MR. FITZPATRICK: Okay. The legal issues, Your Honor, speak for themselves. I believe we can collaterally attack the decree. Res judicata and collateral estoppel do not apply. We were not parties. We were just not parties in the prior proceeding. A party who was not a party at the prior proceeding but who is affected by the judgment in that other case, especially a consent judgment, is entitled to collaterally attack the judgment

[Page 32]

as to the validity on its face, and I think the legal argument speaks for itself on that point. I believe we have shown in our brief irreparable injury. We have shown that a temporary injunction — temporary restraining order would maintain the status quo; that the City would not suffer any great injury by setting this matter over until we can have a hearing on a preliminary injunction. The positions have been open, some of them, since October the 31st. As far as the ten-day rule is concerned, the ten-day rule, as I understand it, is only enforced by the Board in situations where a final certification has been made and the Board in a routine manner accepts late returns on certifications. I don't think we — I don't think the ten-day rule should be staring us in the face as to whether or not a restraining order can be granted. I also believe that should the City be enjoined from making an appointment from the certification list during the ten-day intervening period, that the applicants would be told during that time that they have been enjoined, so I think we have proven the points necessary for the Court to grant temporary relief and we thank the Court for its time this morning.

MR. ALEXANDER: Your Honor, the documents before the Court do indicate there is contrary evidence to the

[Page 33]

affidavits submitted by the individuals with respect to the August appointment. The Chief's affidavit as well as Exhibit 1 to that affidavit reflect, if you will, that the appointments were made on the 22nd. Passing that, I don't think it makes a whole lot of difference. I don't think — we would not construe the decree to stand for the proposition that we must maintain our

balance month by month, day by day. We would assume that our performance under the decree would be assessed at the conclusion of a year. We don't think that there would be anything to prevent us from, as we did, appointing whites and then following with blacks or appointing blacks and following with whites as long as the balance is achieved.

With respect to the legal issues concerning a race conscious remedy, the Court has passed on that. These same objections were urged and indeed the Court focused on this problem and the inquiries of the City at the fairness hearing, which is impending in the Court of Appeals. I don't know of any intervening law or any intervening events which would indicate it would be appropriate for the Court to assess that question at this time. Although I have not made a study of this here, I am not satisfied that the Court would have jurisdiction with respect to that at this time.

With respect to the question of qualifications,

[Page 34]

there are really two arguments that the firefighters make, as I said. One is the representations of Mr. Gray that the seven individuals are more qualified, more superior qualifications, in his terms. The other is that some certification out of rank order is somehow inconsistent with the absence of qualifications or at least relative qualifications. To the first point, the Chief, whose responsibility it is to make these evaluations and whose responsibility it is to insure the efficiency of the department, has asserted that it is his belief that none of the seven whites are in fact demonstrably better qualified. We think it is between Mr. Gray and the Fire Chief that the Fire Chief — and while there is conflicting evidence on that, that our position is strong.

With respect to the question of certification out of rank order, Ms. Hall's testimony indicates that while the Personnel Board has reached tentative judgments about the certification examination, they are continuing their study and presumably have not at this point come to the Court and have no intention at this time of saying that this examination is valid such as to relieve them of their options under the decree. Accordingly, I

don't think that the firefighters are in a position to make a showing that we are appointing less qualified

[Page 35]

people.

On a TRO - and we have made this argument before and I won't repeat it - but I am just not satisfied that the firefighters, or perhaps more accurately the Defendant, et al, are in a position to argue that there is irreparable injury. We are prepared to make appointments from this list. If it is a conclusion by this Court at some point that we have erred, damage, injunctive remedies are fully available and there is simply no reason to interfere with the process when this Court can protect any of these individuals in the event we are concluded to be wrong.

One final point: With respect to the rumors that Mr. Fitzpatrick refers to, the City's intention at this time absent a restraining order from this Court, is to appoint four of the five blacks certified, certified to us, excluding Mr. Ward. Our review of Mr. Ward's history in the department suggests that he is not a candidate at this time. We would appoint, or it is our present intention to appoint, Mr. Bennett, to request from the Personnel Board a new certification. Again with our goals in mind with respect to the other vacancy which is presently open.

THE COURT: I am not sure I understand you on that.

MR. ALEXANDER: Our intention, Your Honor, from the

[Page 36]

list that we presently have requesting individuals for six positions is to appoint five. Four of the five blacks, excluding Mr. Ward and Mr. Bennett. We will then request from the Personnel Board another list for the remaining open position with the goals of the City in mind. These will be its commitment under the decree. We plan to fill five positions; four with blacks, one white; request another list for the sixth position.

THE COURT: What you are really referring to is through the vehicle of having another certification list to bring Mr. Harris up?

MR. ALEXANDER: I don't know that we have Mr. Harris in mind. We would examine whoever the Personnel Board sends to us. I don't know that we have anyone in mind, Your Honor. We would want to — the practice in the Fire Department is to review these individuals as they are certified. We will do that and make judgments on that basis.

Does the Court have further question about that?

THE COURT: Sounds like a continuing problem between the City and the Personnel Board but —

MR. ALEXANDER: It is a continuing problem between the City and perhaps the Personnel Board, but not certainly. It is not unusual for us to find reasons why someone who has been conditionally certified is not a good candidate

[Page 37]

for reasons outside the examination procedure for a particular job. That points to, I think, a continuing problem under this decree. It would seem to me that if the Court in effect says the TRO is warranted in this procedure, that any time there is an out-of-rank appointment, if you will, that we invite repetition of what has happened here. Again, I don't believe that there is any reason to do that when you consider that the City is fully capable of remedying any wrong it might inadvertently commit, and we don't believe in this case that there is any warrant.

THE COURT: Does the Personnel Board have any comment?

MR. WHITESIDE: Excuse me a second, Your Honor.

(Pause.)

MR. WHITESIDE: Your Honor, we don't have an argument. We have an argument between ourselves.

(Laughter.)

THE COURT: Intervenors?

MS. REEVES: Yes, sir. Our part is easy since I am the only one here. There is no one to argue with me.

We would take the position with the Court before any review of the evidence that the Court in essence lacks jurisdiction to grant a TRO in this case and the reasons are several: First, the complaint represents an

[Page 38]

attack upon the constitutionality and the authority of the Court to implement a decree which has already been approved. The issues which the Plaintiffs in the Bennett case raise are the very issues which are on appeal and the rule is that once a District Court had entered a final order and those issues have been taken on appeal that the District Court does lose its jurisdiction. Secondly, in the jurisdictional matter, the Plaintiffs here seek relief in part under Title 7 of the Civil Rights Act and allege that as a basis for relief, but there is no allegation that administrative exhaustion — and we have heard no evidence today that would even amend the complaint as it stands to show any administrative exhaustion through Title 7. There is no private cause of action under the grounds of the — under the Crime [Control] and Safe Streets Act or the State Local Physical Assistance Act. There is another ground which is 42-USC-Section 1981 on which they allege a jurisdictional ground and for that we would direct the Court's attention to a 1979 Fifth Circuit Case of Hefner vs. The New Orleans Public Service, Inc., and in Hefner, there was a — there was the issue presented to the Court of a collateral attack on a previously entered Title 7 consent decree. And there the Court — Mr. Hefner had attempted to exhaust through EEOC. He filed his charge with EEOC, I believe,

[Page 39]

the day before the consent decree was entered, but the Court went right to the heart of the matter and said, "We find that he is barred by laches. He knew of the pending case and we are not going to allow through a collateral attack on a long fought

and an honestly negotiated consent decree an attack on our existing decrees," and cite, among other cases, a case with which this Court is most familiar, [Allegheny-Ludlum] vs. United States. And saying in effect — allowing these suits as a public policy matter would severely undercut the public policy grounds of favoring consent decrees, but in the Hefner case, the Court also noted but decided that laches barred Mr. Hefner; that there were three other circuits which had held that indeed the Court did lack jurisdiction when there was a collateral attack on a consent decree, and the Hefner — at Footnote 14, those cases at the circuit which had taken that position are listed. The Hefner case is at 605 F. 2d 893.

If the Court could envision what might happen if a TRO were here granted, under circumstances where we have a pending appeal, if the Court should decide that a collateral attack is proper, what we have here is a situation where the Plaintiffs seek to enjoin the use of goals quotas in the Fire Department, although the complaint is broadly enough expressed so that it really

[Page 40]

isn't an attack on the goals throughout, that are stated throughout the decree. We might have a situation where the Fifth Circuit would uphold the decree which has been approved, but where we would have a District Court, a District Court decision in which the decree itself would be subject to attack. Not only that, it would encourage others throughout the — who are also affected by the other provisions of the decree to entertain further suits and to file for their suits where we have as we believe a valid decree.

Ms. Hall's testimony showed that there was no disproportionate impact regarding the tests on any whites and as a result of that statement, we would argue that the Plaintiffs in the Bennett case have no standing to argue, no standing to raise any problems with respect to the test. The statistics in the Fire Department, what we are talking here about is even though the decree talks about a 50 percent goal, which goal is limited by the fact that there are available and qualified persons to meet that goal, is a situation where there are of the 140 lieutenants,

captains and battalion chiefs in the Birmingham Fire Department, none are black. We are really talking now about promoting the very first black to a supervisory position in the Fire Department, and this is in a department where in the past there has been restrictions

[Page 41]

until 1958 which limited employment in the Fire Department for whites only.

There is — Mr. Fitzpatrick remarked about the fact that there was soon to be — there was a conflict in the evidence and he challenged the statement which appears in the certification list that there were five blacks — five whites who have been already selected for the position of Fire Lieutenant. Whether there have been five whites or three whites or two whites pursuant to the decree is of no moment. There is nothing in the decree which intends to remedy past discrimination which requires when there is the use of a goal the selection of whites first and then blacks as a last matter. Whether there have been whites or blacks selected should make no difference in the Court's consideration of the TRO.

Our last argument is — addresses itself to the attachment of Mr. Gray in his second affidavit which is that basically since the Department of Justice has changed its position on goals attaching the Assistant Attorney General for Civil Rights testimony that therefore somehow or another that amounts to a legal reason or a legal justification for the issuance of a TRO. There are no Republican decrees and there are no Democratic decrees. This is a situation where we were governed by

[Page 42]

controlling rules of law. We litigated the case of the controlling rules of law and it should not be influenced in any manner nor — and certainly not controlled by the public policy statement of political officials.

Lastly, the Plaintiffs in this case have not met the preliminary injunction standards under Title 7. The Middleton-Currington case which we had previously discussed in Chambers

indicates that sometimes they are — in Title 7 cases there can be an issuance of preliminary injunction properly issued where someone may be denied on an illegal ruling which is sex or race, but in that case, the Court made it clear that it was absolutely imperative that one go through the administrative process first. Thank you.

THE COURT: The Court views the legal basis here of the Plaintiffs' attack attacking the consent decree, the terms of it, as being without merit, or at least being of merit only as it may be addressed through the current proceedings. To the extent they are properly in this Court rather than in the Court of Appeals, the Court believes them to be without legal foundation and merit. Of greater difficulty is the aspect of the complaint which relates to the application and implementation of the decrees as it relates to the current situation. At present time, the list of those certified includes

[Page 43]

eight persons who are not black and five who are black for the potential filling of six positions. The Plaintiffs have urged that the grading used by the Personnel Board which gives rise to these listings is in error in effect by setting a passing or cut-off score at such point as to have a much larger percentage of persons found to pass and in turn be qualified than in prior years. And I take it the Plaintiffs also are attacking the failure of the Personnel Board to use the 70 percent score as a cut-off score. Certainly the materials that the Personnel Board has do indicate 70 as a form or means of arriving at a cut-off score, although the application of that is certainly one that depends upon judgment and it is not merely a flat approach. It is an approach to the setting of cut-off score.

It is perhaps significant in as far as the use of 70 versus a 50 raw score, 50 percent, that this particular test is not the only time it has been done. It was done the very last time according to the evidence presented that the Fire Lieutenant's Exam was scored. Indeed a somewhat lower percentage of correct answers was required on the last exam prior to the consent decree than this one. In as far as the attack upon the failure to use 70 percent raw score as a cut-off point,

[Page 44]

the Court does note that two of the five blacks who have been certified are below that 70 percent score. The Court also notes that one of the whites who has been certified is below that same score, but is held consistently with its application for cut-off score nevertheless to be qualified. In as far as the — I say I do not view the Personnel Board's adoption of this cut-off score as being wrong or certainly I do not view it as an issue on which the Plaintiffs are likely to prevail. It is possible that one might prevail in showing that this was an inappropriate cut-off score resulting in the deeming of people to be qualified who in fact were not. I think it is unlikely however that the Plaintiffs can prevail on that position. There is the question about the language in the consent decree which not only says that there is no requirement to promote someone who is not qualified, but that there is no requirement to promote someone who is demonstrably less qualified than others based on validated testing procedures.

I call to the attention of the parties that the evidence presented to me does indicate a standard error of measurement according to one computer printout of 5.78 on the score, and even if one uses the normative plus or minus two SEM's in order to ascertain true scoring, true test scores, what it means is that there would have

[Page 45]

to be even on that basis a difference of some 22 points in raw score before or 23 points before one could say from a psychometric standpoint that the scores were in fact different for the two individuals or at least to say that with the requisite degree of statistical certainty.

It may be noted here that only with respect to one of the whites certified is there a four SEM difference from the highest black who is on the list. It may also be noted, of course, that the actual test scores of whites and blacks, all 13 of them, are to some degree interspersed with blacks coming in the middle or at least some of the blacks coming in the middle of some of the whites' socres [sic] as well as there being one black at the

thirteenth point. The Court thinks it is unlikely that the Plaintiff could prevail in showing the requisite demonstration of higher qualifications of whites on the certified list as compared to blacks, with the sole exception of Mr. Ward, whose score is not only the lowest out of the group and indeed lower than any 70 percent gross score, but is almost four SEM's below the lowest white score of any on the list, which itself was below the 70 percent raw score rather.

The Court would be prepared to restrain the City from appointing as an application of the consent decree

[Page 46]

Mr. Ward; however, I understand the City to be indicating that such a requirement, restriction is not necessary in that the City does not anticipate the appointment of Mr. Ward from the list. Based upon that statement, I will decline to issue any form of temporary restraining order; however, I would say that counsel for the City should confirm that there is no intention to appoint Mr. Ward and that perhaps if there is some change of position on the part of the City that would make that a realistic possibility that the Court and counsel for the Plaintiff should be advised.

MR. ALEXANDER: The City will undertake that, Your Honor.

THE COURT: The application for a temporary restraining order is denied by virtue of the only point with which the Court might agree becoming in a sense unnecessary as I view it to be dealt with by a temporary restraining order. I do note that this action by the Court would effectively mean that only four of the five blacks could be appointed and that even if the Plaintiffs prevail on the point that the three whites first appointed to Lieutenant that are involved in this matter were found to have been appointed prior to the entry of the decree, it would still, if all positions are filled from the six being here requested

[Page 47]

together with the two whites previously appointed, result in the City's in effect having maintained a 50 percent appointment

ratio for whites, for blacks since the date of the decree which would certainly not be contrary to the decree itself. I do agree that the City is not obliged to keep itself on each appointment in line with the 50 percent provision of the decree. On the other hand, it is certainly permitted to do so and this, the result of this action by the Court will permit it to be in effect on that 50 percent basis if it chooses to be so at this point.

That is the decision of the Court denying the application for a temporary restraining order. There is next the problem of setting a date for a preliminary injunction. I think what I would request is that the parties indicate to me by Tuesday of next week, Number One, what discovery, if any, is requested prior to any such hearing and, if possible, an indication of what additional evidence would be tendered above and beyond that presented here. That could be of guidance in knowing when to set a preliminary injunction. I doubt that the Plaintiffs can prevent [sic] evidence that would cause a change of ruling by the Court, but it is possible. I never know until I see the evidence that might be presented, but that will be the decision. I expect to

[Page 48]

hear back from counsel so that I could be guided in terms of setting a date for a preliminary injunction, there having been no consent to treat this hearing as a preliminary injunction, but insists that it be only for the TRO which in one sense makes it non-appealable.

MR. FITZPATRICK: That's exactly what I wanted to bring up. Your Honor, there is a case —

THE COURT: That may have been one reason — I don't know why the Defendants declined to waive their five-day notice. I really don't know.

MR. FITZPATRICK: By your comments this morning, it is very clear that we would in all probability not receive a preliminary injunction. I personally have no further evidence at this time that I can produce for the Court, especially in view of the Court's comment on the legal issues which we admit are purely legal; that we would ask the court to deny our request

for a preliminary injunction on the legal issues. That can even be severed.

THE COURT: Let me stop you for a moment. I thought you indicated when I requested for this hearing this morning might be on the basis of preliminary injunctive relief as well as the TRO, that while you were willing to do so on the legal issues, there was further discovery that you wanted before proceeding on

[Page 49]

the preliminary injunction and it is in that light that I had just a moment ago indicated that perhaps you wanted to have some further discovery.

MR. FITZPATRICK: Well, Your Honor, the ideal situation for me at this time would be a severance of the legal issues.

THE COURT: That will not be permitted.

MR. CONWELL: Would you give us just a moment, Judge?

THE COURT: Sure.

(Pause.)

MR. FITZPATRICK: Your Honor, we did not know what evidence would be presented here. We now know what it is. We would request that this be considered as on the application for preliminary injunction.

THE COURT: Unless the Defendants agree to that, it cannot be so converted.

MR. ALEXANDER: The City is prepared to agree to that, Your Honor.

MR. WHITESIDE: So is the Board, Your Honor.

THE COURT: By waiver of the notice requirement from the City and upon agreement and request by the Plaintiffs, this hearing is deemed also to have been held as one for a preliminary injunction and the preliminary injunction is denied on the same basis and for the

[Page 50]

same reasons that the temporary restraining order is denied. The Clerk will be directed to make a brief minute entry indicating the fact of denial after hearing.

MR. FITZPATRICK: Your Honor, may I go ahead and file my notice of appeal in view of that and application for stay pending appeal?

THE COURT: You certainly may file with the Clerk. I have another matter to attend to. It was set at 10:30. You may file the notice of appeal with the Clerk. You may also file the application for a stay. That is denied.

MR. FITZPATRICK: Your Honor, we would request a limited stay until Monday morning.

THE COURT: That is denied.

MR. FITZPATRICK: Thank you, sir.

THE COURT: The Court will take about a ten-minute recess before calling the next case.

(All proceedings ended on April 23, 1982, at approximately 11:00 a.m.)

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S

ANSWER

For answer to the complaint herein, defendants Richard Arrington, Jr. and the City of Birmingham say as follows:

FIRST DEFENSE

The complaint fails to state a claim for relief against these defendants upon which relief may be granted.

SECOND DEFENSE

Plaintiffs have failed to join a party in whose absence complete relief cannot be afforded.

THIRD DEFENSE

To the extent this action is predicated upon a claim of discrimination on the basis of race, white, pursuant to Title VII of the Civil Rights Act of 1964, as amended, plaintiffs have failed to satisfy the necessary statutory pre-conditions for suit.

FOURTH DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FIFTH DEFENSE

Plaintiff James A. Bennett is without standing to bring this action.

SIXTH DEFENSE

Plaintiffs lack standing to bring this action.

SEVENTH DEFENSE

This action is barred by laches.

EIGHTH DEFENSE

For further answer to the complaint herein, defendants Arrington and the City of Birmingham say as follows with respect to each paragraph of the complaint respectively:

1. These defendants deny the allegations of paragraph 1.

2. These defendants are without sufficient knowledge or information to form a belief as to the truth as to allegations of paragraph 2 of the complaint and, accordingly, deny same.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. The City of Birmingham admits that it either is, or has been, a recipient of various federal funds as alleged.

8. These defendants admit the allegations of paragraph 8 except that these defendants are unaware of how many persons passed the fire lieutenant's examination and how they were ranked by the defendant Personnel Board, except as evidenced by certification forwarded to the City.

9. These defendants admit the allegations of paragraph 9 except that these defendants are unaware of the

number of persons who passed the examination and were otherwise eligible for promotion.

10. With respect to the allegations of paragraph 10, the City admits that it requested the Personnel Board to certify five persons for the position of fire lieutenant, admits that Exhibit A is a true copy of that request; otherwise the allegations of paragraph 10 are denied.

11. These defendants admit that, in response to their request Jefferson County Personnel Board furnished a certification list, a true copy of which is attached as Exhibit B to the complaint. These defendants deny the remaining allegations of paragraph 11.

12. These defendants deny the allegations of paragraph 12 of the complaint.

13. These defendants deny the allegations of paragraph 13 of the complaint.

14. These defendants deny the allegations of paragraph 14 of the complaint.

15. These defendants deny the allegations of paragraph 15 of the complaint.

16. These defendants deny the allegations of paragraph 16 of the complaint.

17. These defendants deny the allegations of paragraph 17 of the complaint.

18. These defendants admit the allegations contained in the first sentence of paragraph 18 of the complaint, except that these defendants deny that Henry Ward, Jr. was promoted to fire lieutenant. These defendants deny the remaining allegations of paragraph 18.

19. These defendants deny the allegations of paragraph 19 of the complaint.

20. These defendants deny the allegations of paragraph 20 of the complaint.

21. These defendants deny the allegations of paragraph 21 of the complaint.

22. The allegations of paragraph 22 of the complaint require no response of these defendants.

23. Except as herein expressly admitted the allegations of the complaint are denied.

24. These defendants deny that the plaintiffs are entitled to any relief whatsoever.

WHEREFORE, these defendants demand that a judgment be entered on behalf of these defendants and that these defendants be awarded their costs, reasonable attorney's fees.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Eldridge D. Lacy
Eldridge D. Lacy

Attorneys for Defendants

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

[Certificate of Service, dated May 3, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION of CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65(b), Federal Rules of Civil Procedure, the plaintiffs petition the Court to temporarily restrain the above named defendants and their agents, officers, attorneys, employees, successors, and assigns, and all persons acting in concert with them, from enforcing any of the promotional provisions of the consent decrees approved in Case Numbers

75-P-0666-S, 74-Z-17-S and 74-Z-12-S, and from in any way limiting the rights of plaintiffs to be certified for promotion and promoted to classifications within the City of Birmingham Engineering Department except strictly in accord with the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945, as amended to date.

Petitioners have heretofore filed a verified Complaint questioning the validity of the said consent decrees and the application thereof to the plaintiffs. This Petition is filed in order to maintain the status quo until the Court can set down and hear the plaintiff's Motion for Preliminary Injunction. Plaintiffs and their attorney certifies [sic] that notice, by telephone, has been given to the office of the attorney for the City of Birmingham and the regular attorney for the Personnel Board defendants. Plaintiffs further state that the petitioner is in danger of suffering immediate and irreparable injury, loss, or damage if the defendants immediately enforce the promotional and certification provisions of the said consent decrees.

Petitioner further states that the Temporary Restraining Order sought cannot result in any injury to the defendants since the petitioner only seeks to maintain the status quo until the hearing on the petitioners' prayer for preliminary injunction can be heard.

In further support hereof, petitioner submits the verified Complaint sworn to by the plaintiff and offers to post such security as ordered by the Court.

WHEREFORE, petitioners pray for such temporary injunctive relief as prayed for above and such other general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Plaintiffs

OF COUNSEL:

FOSTER, CONWELL & GLOOR
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[Certificate of Service, dated August 30, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

COMPLAINT

1. This Court has jurisdiction of this action under 28 U.S.C. § 1343 and 28 U.S.C. § 2201.

2. The individual plaintiffs are residents of Jefferson County, Alabama and over the age of twenty-one years, except plaintiff Laughlin is a resident of Blount County, Alabama.

3. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. 200e(b).

4. Defendant Richard Arrington, Jr. is Mayor of the City of Birmingham and responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning and promoting of employees of the City.

5. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama, is an employer within the meaning of 42 U.S.C. 200e(b), as amended, and is engaged in the procuring and screening of applicants and certification of eligibles for appointment with defendants named in paragraphs 3 and 4 and in the administration of a civil service system for such defendants.

6. Defendants James B. Johnson, Henry P. Johnston and Hiram Y. McKinney are members, and Joseph W. Curtin is Director of the Jefferson County Personnel Board, and as such they are responsible for its administration and operation, including the procuring and reviewing of applicant and certification of eligibles for appointment with defendant named in paragraphs 3 and 4.

7. Defendant United States of America is a party to the consent decrees entered in case #CV-75-P-0666-S, Northern District of Alabama.

8. Plaintiff Birmingham Association of City Employees (hereinafter "BACE") is an unincorporated labor association of employees of the City of Birmingham. The individual plaintiffs file as representative parties of BACE, as well as individually. Said plaintiffs will fairly and adequately represent the interests of the association and its members. Rule 23.2, FRCP.

9. Plaintiffs are white, male employees of the City of Birmingham. Pursuant to the provisions of Act No. 248 of the Regular Session of the Legislature of Alabama of 1945 as amended to date (hereinafter referred to as the "Civil Service Act"), plaintiffs have applied for, and taken the examination for, promotion to the classification of Civil Engineer of the City

of Birmingham. In partial discharge of their obligations under the Civil Service Act, the Personnel Board defendants and defendant Director ranked the persons who passed the Civil Engineer examination administered on June 14, 1982 and were otherwise eligible for promotion under the provisions of the Civil Service Act. The plaintiffs are among the top eight ranked candidates of the persons who passed and were ranked in the following order by the Personnel Board:

1. David H. Woodall
2. Kenneth O. Ware
3. Danny R. Laughlin
4. Phillip H. Whitley
5. Dudley L. Greenway
6. Jerry L. Henson
7. Gerald L. Johnson
8. Marshall G. Whitson

10. The following person is black male employee of the City of Birmingham who also has applied for, and took the examination for promotion to the classification of Civil Engineer of the City of Birmingham. Among the said persons who passed the said examination and were otherwise eligible for promotion, this said person was ranked as follows:

9. Lucious [sic] J. Thomas, Jr.

11. In August, 1982, the City through the defendant Mayor Arrington requested the defendant Personnel Board, through its Director, to certify to it persons for promotion to one open Civil Engineer vacancy.

Said request for certification requests that the Board and its Director certify names on the basis of race and further evidences the City's and Arrington's intention to promote employees on the basis of race. Plaintiff is further advised that all City department heads, including the City Engineer, have promised the Mayor to promote blacks.

12. Pursuant to the City's and Mayor's request, the Personnel Board defendants and its Director made a certification of names, a true copy of which is attached hereto as Exhibit A. The Personnel Board defendants and its director, intentionally and knowingly certified the fourth name on the Exhibit A certification on the basis of race. On or about August 18, 1982, the City promoted Lucious [sic] Thomas to the classification of Civil Engineer purely on the basis of his race and in violation of the Civil Service Law and the Fourteenth Amendment. Although the appointment has been made, it is not effective until September 4, 1982.

13. The defendants City and Arrington are following a policy of hiring and promoting their employees on the basis of race or color with black employees being employed, hired and promoted on the basis of their race in accord with numerical quotas or goals rather than purely upon merit and superior qualifications, all constituting illegal and unconstitutional discriminations against whites in hiring and employment practices.

14. The Personnel Board, its members and its Director are certifying candidates for hiring and promotion to the appointing authority on the basis of race, favoring blacks to the deference of whites, rather than in a color blind fashion and solely on the basis of merit, competition and superior qualifications.

15. The defendants are certifying candidates and making promotions on the basis of race under the assumed protection of consent settlements entered into and approved by this Court in Case Numbers 75-P-0666-S, 74-Z17-S, and 74-Z-12-S. The provisions of said settlements are illegal and the judgment of approval of said settlements is void on its face in that said consent decrees provide for defendants to act in a manner contrary to the provisions of the Civil Service Act, the Fourteenth and Fifth Amendments to the Constitution of the United States, Title VII of the Civil Rights Act of 1964, and other statutes as cited herein.

16. The failure of the Personnel Board, its members and its Director to certify only the first three persons on the register

of eligibles pursuant to the request is illegal and in violation of the Civil Service Act, as it is presently constituted.

17. The defendants' acts and practices described in paragraphs 11-16 constitute a pattern and practice of resistance to the full enjoyment of the rights of whites and plaintiffs in particular to equal employment opportunities within their jurisdictions and under their supervision and control. This pattern and practice is of such a nature and is intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. § 1981. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

18. Plaintiffs further allege that the aforementioned consent decrees, as said decrees relate to plaintiffs, contain illegal and unconstitutional remedies and are void on their face.

19. Plaintiffs aver and believe the appointment of Lucious [sic] J. Thomas, Jr. will be made effective on September 4, 1982. Such appointment of said person, on the basis of race, will cause immediate and irreparable damage and harm to plaintiffs, all in violation of their constitutional rights. The granting of a Temporary Restraining Order will not prejudice or irreparably harm the rights of defendants, but will maintain the status quo. Plaintiffs further offer to post sufficient security as set by the Court.

20. Plaintiffs aver that there is an actual controversy within the jurisdiction of this Court pursuant to 42 U.S.C. § 2201 as to the rights and other legal relations of the parties concerning the legality of the defendants' actions and the aforementioned consent decrees.

21. In the alternative, and not conceding the validity of the consent decrees, plaintiffs aver that defendants are not properly implementing the consent decrees in that the Personnel Board has certified for promotion and the City intends to

promote persons on the basis of race who have been shown to be demonstrably less qualified for the position of Civil Engineer, in violation of paragraph #2 of the City of Birmingham Consent Decree. There are real and substantial controversies between the parties governing the standards to be followed and duties of the parties in properly implementing the said consent decrees, which this court has jurisdiction to oversee and supervise. Defendants are ignoring the provisions of paragraph #2 of the City of Birmingham consent decrees and continuing to promote demonstrably less qualifed persons solely on the basis of race.

22. Plaintiffs offer to do equity.

WHEREFORE, plaintiffs pray that defendants, their official agents, employees, and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory employment practice based on race, or sex, and specifically from:

a. Failing or refusing to recruit, hire, assign and promote white applicants and employees on an equal basis with black applicants and employees;

b. Failing or refusing to recruit, hire, assign and promote male applicants and employees on an equal basis with female applicants and employees;

c. Failing or refusing to eliminate qualifications, and other selection standards which have not been shown to be job related and which disproportionately exclude whites and males;

d. Failing to strictly follow the certification and appointment provisions of said Civil Service Act;

e. Enforcing or complying with the provisions governing promotional goals or quotas relating to promotions or special certification provisions so as to insure appointments in compliance with said goals as provided in paragraphs 5, 7, and 9 of the City of Birmingham consent decree and paragraphs 23 and 34 of the Personnel Board consent decrees, all as referred to in paragraphs 13 of this Complaint.

f. In the alternative, failing to enforce and follow the provisions of paragraph #2 of the City of Birmingham consent decree and failing to promote demonstrably better qualifed persons.

g. Failing to roll back the provisional appointment of said Lucious [sic] J. Thomas, Jr. to the classification of Civil Engineer.

Plaintiffs further pray that this Court will enter its declaratory judgment governing the rights, status and obligations of the parties and find the said consent decrees and judgment approving them to be void as illegal, unconstitutional, vague and indefinite, and violative of public policy. Plaintiffs further pray this Court will enter its declaratory judgment concerning the legality and validity of the actions of defendants as described in this Complaint, and for such other related declaratory relief to which plaintiffs may be entitled including this Court's declaration of the procedures and standards to be employed in fairly implementing the provisions of paragraph number two of the City of Birmingham Consent Decree.

Plaintiffs further pray for monetary and punitive damages, a reasonable attorney's fee for their counsel of record, and court costs.

Plaintiffs pray such other alternative or general relief to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
Raymond P. Fitzpatrick, Jr.
Attorney for Plaintiffs

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SERVE DEFENDANTS AT:

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City Hall
Birmingham, Alabama 35203

Personnel Board, Its Members, Director Curtin:
Annex, Jefferson County Courthouse, Room 301
Birmingham, Alabama 35203

United States of America
Attorney General William French Smith
Justice Dept.
Washington, D.C.

U.S. Attorney Frank W. Donaldson
Federal Courthouse
Birmingham, Alabama

[Certificate of Service, dated August 30, 1982, verifications and exhibit omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida Mc-

Gruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny and otherwise respond as follows:

1. Paragraph one is denied.

2. Paragraphs 2-7 are admitted.

3. Defendant-intervenors are without sufficient information to admit or deny the first sentence of paragraph 8 and deny the remainder thereof.

4. Defendant-Intervenors are without sufficient information to admit or deny the allegations of paragraphs 9, 10, and 11.

5. Paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 are denied.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The plaintiffs lack standing to bring this action.

THIRD AFFIRMATIVE DEFENSE

This Court lacks jurisdiction of the subject matter of this action.

FOURTH AFFIRMATIVE DEFENSE

This action is barred by *res judicata* in that the claim or claims herein asserted were finally adjudicated by judgment of this Court entered in the case of *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. CA 74-P-17-S, on August 18, 1981.

FIFTH AFFIRMATIVE DEFENSE

This action is barred by the laches of the plaintiffs.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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Attorneys for Defendants

By /s/ Susan W. Reeves

[Certificate of Service, dated August 31, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

ANSWER OF THE PERSONNEL BOARD OF JEFFERSON COUNTY AND ITS MEMBERS AND DIRECTOR

Come now the Personnel Board of Jefferson County, its members, Henry P. Johnston, James B. Johnson, and Hiram Y. McKinney and its director Joseph W. Curtin and answer the complaint of the plaintiffs as follows:

1. The Personnel Board, its members and director admit the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 9, and 10 of the complaint.

2. The Personnel Board of Jefferson County and its members and director deny the allegations of paragraphs 14, 16, 17, 18, 20 and 21 and demand strict proof thereof.

3. The Personnel Board of Jefferson County and its members and director have insufficient knowledge to either admit or deny the allegations of paragraphs 13, 19 and 22 and demand strict proof thereof.

4. The Personnel Board of Jefferson County and its members and director admit the allegations of the first sentence of paragraph 8 and the first paragraph of paragraph 11, but the defendants have no knowledge as to the second and third sen-

tences of paragraph 8 and the second paragraph of paragraph 11 and demand strict proof thereof.

5. The Personnel Board of Jefferson County and its members and director admit the first sentence of paragraph 12; deny the allegations of the second sentence of paragraph 12; demand strict proof of that allegation; have no knowledge of the remaining allegations of paragraph 12 of the plaintiff's complaint, but demand strict proof thereof.

Respectfully submitted,

/s/ David P. Whiteside, Jr
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

OF COUNSEL:

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[Certificate of Service, dated August 31, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association; GERALD L. JOHNSON; PHILLIP H. WHITLEY; DAVID H. WOODALL; DANNY R. LAUGHLIN; MARSHALL G. WHITSON; DUDLEY L. GREENWAY; and, KENNETH O. WARE,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; JAMES B. JOHNSON, HENRY P. JOHNSTON, and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; JOSEPH W. CURTIN, as Director of the Jefferson County Personnel Board; JEFFERSON COUNTY PERSONNEL BOARD; and, the UNITED STATES OF AMERICA,

Defendants.

CIVIL ACTION NO.
CV 82-P-1852-S

MOTION TO INTERVENE AS PARTIES DEFENDANT

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to in-

tervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that certain provisions of a consent judgment entered by this Court in *John W. Martin, et al. v. City of Birmingham, et al.*, Civil Action No. 74-Z-17-S, are illegal and void and pray that their enforcement be enjoined.

2. The complaint in this case also alleges that the defendants in the case of *John W. Martin, et al. v. City of Birmingham, et al.* are not properly implementing the consent decree in that case.

3. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* and are entitled to enjoy the benefits of the consent judgment there in entered.

4. The consent judgment in the case of *John v.* [sic] *Martin, et al. v. City of Birmingham, et al.* is valid on its face and is not subject to collateral attack in another proceeding.

5. The interest of the movants, both on their own behalf and on behalf of others, in the integrity and proper implementation of the consent judgment in the case of *John W. Martin, et al. v. City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability fo [sic] the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgment in *John W. Martin, et al. v. City of Birmingham, et al.* and none can adequately represent in this action the interest of the movants.

6. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have common questions of both law and fact with those defenses assertable by the present defendants.

7. The Consent Decrees attacked require by their terms that the parties to said decree defend them when challenged.

A proposed answer of the movants is attached.

Movants request oral argument on this motion.

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Counsel for Movants

By /s/ Susan W. Reeves

[Certificate of Service, dated August 31, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

AFFIDAVIT OF JOHN DUNCAN

I, John Duncan, being duly sworn according to law, depose and say that:

1. I am a graduate Engineer and am employed by the City of Birmingham, Alabama as its city engineer.

2. I have been employed in the City's Engineer Department since June 10, 1948 and since that time have occupied successively higher positions in the Department until my appointment as Assistant City Engineer on September 22, 1970 which position I held until March 22, 1980 at which time I was appointed City Engineer.

3. In my 34 years in the Department, the highest rated position held by a black employee, prior to the promotion (effective September 4, 1982) of Lucius Thomas to the position of Civil Engineer, was that of Chief of Party. Lucius Thomas was appointed as Chief of Party on June 1, 1977.

* * *

/s/ John Duncan
John Duncan

Sworn and subscribed before me,
this 1st day of September, 1982.

/s/ Notary Public
Notary Public

[Exhibit and Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

CAPTION

The above entitled cause came on to be heard before the Honorable Sam C. Pointer, Jr., United States District Judge, United States Courthouse, Birmingham, Alabama, commening [sic] at 11:00 A.M., Thursday, the 2nd day of September, 1982, whereupon the following proceedings were had and done.

* * *

[Page 3]

PROCEEDINGS

THE COURT: All right. In connection with the application of the plaintiffs for a Temporary Restraining Order, it is first to be submitted to the Court certain items of documentary evidence as to which the only objections might go to relevancy, not as to authenticity. Perhaps we can have some identification of those.

If you will, hand those to Miss Clark.

* * *

[Page 5]

THE COURT: All right. Thank you. I do understand that. I take it still to be an objection as to relevancy?

MR. SPITZ: Yes.

THE COURT: And it is overruled at this point, but it is noted you need not repeat that on any further items of evidence, either documentary or by interrogation of witnesses.

MR. FITZPATRICK: I take it there is no need for me to respond to that?

THE COURT: No. All right. I take it the next item, then, is the short, brief examination of two witnesses.

Who do you wish to call?

MR. FITZPATRICK: Miriam Hall, please.

MR. FITZPATRICK: Your Honor, before I begin the examination, I did want to request the Court to take notice

[Page 6]

of the record in the *U.S.A. versus Jefferson County* case and the consolidated cases, 76-P-0666-S.

THE COURT: I will take judicial notice of those. It may, however, be proper to call my attention to some facet of that and with more particularity.

* * *

[Page 34]

THE COURT: All right. Anything else in the way

[Page 35]

of evidence?

MR. FITZPATRICK: No, sir, Your Honor.

MR. ALEXANDER: No, Your Honor.

MR. WHITESIDE: No, Your Honor.

THE COURT: Okay. The question is one of argument as to what I should do given this state of affairs. I, of course,

am familiar from both the consent decree and from an earlier suit of basic principles, but I would be happy to hear from counsel in terms of the application of those principles to this particular inquiry.

MR. FITZPATRICK: I will take two minutes, if I may.

THE COURT: Surely.

MR. FITZPATRICK: Your Honor, as far as the statistical evidence and inferences that can be drawn from that, I believe the argument in my brief — and I tried to make it as concise as possible in the brief, and yet lay it out for you — shows that the persons who have been certified are demonstrably better qualified according to job related examinations, which have been determined to be content valid for minimum qualifications and rank order. There is no evidence to the contrary.

THE COURT: By that analysis, however, I take it, for example, there is one white who is demonstrably better qualified than those who could have been appointed by the city engineer who had the top three eligibles only be

[Page 36]

certified?

MR. FITZPATRICK: Well, that may be, but then that is not a consent decree. That is a question of state law.

THE COURT: Excuse me. I interrupted.

MR. FITZPATRICK: No. I'm sorry. The seniority points had no impact on their ranking. Approaching it from a number of different approaches, either one standard error of difference, two standard errors of difference or four S.E.M., *et cetera*, as your Honor mentioned in the *Bennett* case, one, two and three are all demonstrably better qualified, as are four and six.

It is my personal opinion that one standard error of difference is a proper way, and that is also mentioned by Anastasia [sic] in her treatise, which Your Honor relied on in the regional trial in the case.

As far as the Personnel Board's argument concerning the applicability of S.E.M. in this case, there has been no evidence presented that it is unreliable. Concerning the type — I believe this is a proper time for the Court to begin to lay out some instructions or some guidelines for the City to follow in implementing paragraph two of the decree. That was one of the motivating forces behind the filing of this case. Paragraph No. 2 is in the decree, and the Court took it into consideration when the Court approved the decree, and we are relying on

[Page 37]

that in coming before Your Honor today.

I think state law provides that an interview is to be conducted, and all the persons are to be considered. The interview process in this instance was a sham. The whites were never given any fair consideration. It was more or less an automatic appointment.

We do raise the collateral attack, and I heard Your Honor's comments about that before, but, at any rate, it is raised. And, Your Honor, I think we can also see that if we sent Mr. Duncan — Mr. Duncan testified that there was a lot of supervisory work to be conducted by this particular person.

If one looks at the exhibit and takes the first component of the exam; that is, part one of the exam; as shown on the third page of my brief, number one scored 29; two, 26 and three, 31. Number nine scored 18 on that component of the exam, which we believe is a demonstrable difference or a significant difference in test scores on that part of the exam which measures supervisory public relations and civil engineering practice and theory.

Your Honor, we believe that the position has been open for some time, that the granting of a temporary restraining order would maintain the status quo until we can continue to develop the case. We think it's proper for the Court to lay out some instructions for the

[Page 38]

City as to the proper implementation of the decrees upon final submission of either the motion for preliminary injunction or the permanent injunction, and we are raising this particular instance as a case in point of how the City is going about the practice of implementing the decrees. The public interest will be served by the maintaining of the Personnel Board's civil service axism [sic].

No substantial harm will come to the City from a temporary delay pending final resolution of the motion for preliminary injunction. As far as irreparable injury is concerned, this is a continuing, chilling effect upon the rights of the plaintiffs to have — for equal opportunity for advancement.

As it is right now, they have zero opportunity for advancement. In fact, the people come to me and say, "the way it is now, if a black passes the exam, I have no possibility of promotion. Why bother taking the exam?"

Thank you, Your Honor, for hearing us this morning.

MR. ALEXANDER: Your Honor, on behalf of the City, we have dealt with a number of these issues before, and I don't want to burden the Court with what I perceive or how our position is and how it's going to stay.

The facts are; there were four people

[Page 39]

certified. Our man looked at four people, concluded that two had particularly irrelevant experience and selected the black. He selected the black in light of the fact that he had a 25 percent interim goal under the decree. No question about that.

And there is no question that under that goal, he was well below his interim level for 39 permanent placements on an interim or long-term basis. We believe the cases still continued to support that.

He testifies that Mr. Thomas is competent to perform the job. There has been no real challenge that Mr. Thomas is not competent to perform that job.

We think the intervention of a T.R.O. is unwarranted and simply not proper, given four factors of which the Court is familiar and weighed in this case as it has been weighed in others.

MR. WHITESIDE: Your Honor, unless the Court has some specific question, the Board would just rely on its trial brief and not present any more.

MR. RITTER: Your Honor, I just have a few general comments I would like to make since we are named defendants. My name is Richard Ritter; I'm an attorney with the Department of Justice.

The plaintiffs' complaint, insofar as it seeks to challenge the merits of the consent decree,

[Page 40]

constitutes, in our judgment, an impermissible collateral attack on the lawfulness of the consent judgment of this Court.

As the Court knows, that judgment was given final approval after a well publicized fairness hearing in August of 1981, and only after the Court had carefully assessed the merits of the proposed judgment and the objections made at the fairness hearing.

As far as I know, none of the individual plaintiffs here, nor the association, have registered any objection to the lawfulness of the proposed judgment at that hearing. Moreover, the arguments they now seek to raise in their complaint insofar as the merits of the consent decree are concerned were raised by others in the fairness hearing, that the Court ruled on the merits of those objections at that hearing.

Now, to the extent that the plaintiffs seek to challenge the implementation of the consent decree in this instance, it is our view that the proper course would be for the individuals with these kinds of grievances to seek permissive intervention in the lawsuit that generated the consent decree and not to file a separate lawsuit such as we have here.

To permit this lawsuit, as there is seven other lawsuits recently filed by city employees with similar

[Page 41]

grievances to perceive their separate ways through the judicial system, would fail to serve, in our judgment, the orderly administration of justice, can only invite continuous fractious litigation by other city employees and, I think, unduly hamper the City's efforts to comply with the consent decree.

MS. REEVES: My name is Susan Reeves and I represent the intervening Martin plaintiffs. We would add that the collateral attack is improper, that the conditional remedy of backpay is available, and if indeed in the course of other proper litigation that any of the plaintiffs are determined to have been more qualified or under any standard should have received a promotion, this is simply not a situation warranting a T.R.O.

There is no allegation, even in the complaint under Title Seven, which is alleged to have been violated. E.E.O.C. Commission can file any change or any contact or meeting with those administrative prerequisites. Apparently the T.R.O., which is sought, is based solely on the difference in the test score. And the evidence was the selecting official, Mr. Duncan, was not even aware of the test score.

Nor was the test score the only selected factor. It was simply one factor among several. Another, the experience, and that Mr. Thomas, who was selected, has

[Page 42]

substantial experience. The selection of Mr. Thomas, in Mr. Fitzpatrick's questioning, has met the goal. Whites are not going to be prohibited hereinafter and forever and always from being selected from promotion.

The selection for the first time, the first black civil engineer, has satisfied the obligations under the consent decree, and it appears that in fact that the job has been offered, has been accepted, the recommendation made, and the appointment accepted. Indeed, there is not a vacancy.

If we were in the situation where we had a man who had to leave one employer and go to another after he has been offered and accepted a job, we would say there isn't a vacancy for the Court to hold open.

Last, with respect to paragraph two, the language of the decree says nothing herein shall be interpreted as requiring the City to hire unnecessary personnel, transfer or promote a person who is not qualified.

We are not talking here about a requirement of the City to hire. We are talking about a selection of the City's own volition in compliance with the decree. Moreover, we think that, lastly, that this decree and this selection is fully in compliance with the doctrine of [*Weber*] as has been decided by the Supreme Court.

[Page 43]

MR. FITZPATRICK: Your Honor, as far as the argument of the government concerning the separate lawsuit, as in the *Bennett* case, this Court exercised supervisory jurisdiction over implementation of the consent decrees in guiding the *Bennett* case through the trial level before it was appealed. And the reason why we filed a separate lawsuit and paid $60 more, really, is simply to raise the collateral attack issue. We could —

It really makes no difference whether it is filed under a separate number of [sic] not. This is the first time that one of these positions has come open since 1973. It — effectively, the whites have been denied any opportunity for promotion, and by Mr. Duncan's own testimony, he does not expect such a position to come open for several years, by which time this current list will have expired.

As far as Ms. Reeves' argument about what the decree says, nothing herein requires the promotion of a less qualified person. The decree is the only basis upon which the City is permitted to make a race-conscious promotion. Without the decree, they have to follow the Personnel Board law.

Personnel — under the Personnel Board law, the man would never have even been certified in the first place. Without — Mr. Duncan's own testimony says that he is just following the decree, and it is his interpretation

[Page 44]

that the decree requires him to make the promotion.

We thank the Court for hearing our argument.

THE COURT: Insofar as the question of whether it is proper to have a separate lawsuit rather than intervention in the other lawsuit, I think a separate lawsuit is permissible, and to some degree is advantageous, rather than having it be presented in the context of a very old, long record and then trying, in the event of an appeal, at review to sift through what is needed and what is not needed.

That is not to say the Court believes that a collateral attack or even a direct attack on the consent decree is proper, but, of course, that is a matter, I take it, that is before the Court of Appeals at this time.

MR. FITZPATRICK: In *Bennett* and in *Thaggard* —

Excuse me for interrupting.

THE COURT: So, I have no problem with it being presented in the form of a separate lawsuit. It may be that a part of the problem comes from some of the reasoning that the Court used in an earlier lawsuit in which it was evaluating the significance of persons being certified and potentially being promoted where there were substantial and statistically significant differences in test score components which contributed to the rating system.

It seems to me this is one of the main problems that is here presented and which gives rise to the

[Page 45]

particular focus of this complaint.

Without going into all of the background of the other case, the Court's utilization of a standard error of measurement or, indeed, consideration of a standard error of difference would be as I view it merely a part of the overall process of trying to decide whether the consent decrees were being misapplied or not in the other case. My recollection is that not only was there significant difference in raw scores that the Court noted, but, indeed, that appointing authorities or those charged with responsibility for the City's decision were of the view that a particular employee was not qualified at all, so that there was

other evidence, as I recall it, dealing with that particular matter.

In this particular case, it is clear to me that the reason why Mr. Thomas has been selected is because of race, in that the chief engineer, the city engineer, has been quite candid that were race not a factor, were the consent decree not in place, another individual would have been selected by him from among the four certified to him. The evidence is that the person selected is, in his view, and indeed as shown by the test scores of tests conducted by the Personnel Board, which at least the Personnel Board believes to be content valid, qualified and competent to do the work.

[Page 46]

The only question, really, relates to the use for ranking purposes of various candidates where the scores of the successful applicants contribute to their ranking on the list of eligibles and, in turn, determine who would be certified by the board.

It is perhaps of some significance in that respect that the Personnel Board system and the use of tests given under state law prior to the consideration of Title Seven implications leads to problems. It is in this case shown that the person that the city engineer would have selected, but for consideration of the consent decree, was according to the test scores less qualified than persons that the city engineer would have rejected.

Obviously, the problem is that any test administered by a Personnel Board may not totally duplicate the perception of an employing agency as to who is more or less qualified. The Personnel Board system represents some compromise in the process of seeing that only qualified persons are certified, but then leaving to the employing agency flexibility within the list of those certified for ultimate selection.

The point is made there hereby, in effect, selecting a black because of his race, although the person is qualified to do the job, this has the effect of precluding all of the plaintiffs and others from the employment

[Page 47]

opportunities because of their race.

The Court notes that only one of the plaintiffs could have been selected and that whoever was selected would have, in a sense, curtailed the employment opportunities of all the rest. It

still follows that whoever that person would be, whether it be the person the city engineer says he would have selected or one of the others that was either certified or that has brought this suit, the fact remains that others would have been limited in their opportunities.

Very few vacancies, apparently, will come open in this job, or have been open in this job. It's a two-person job. The past persons who have held this job have all been white. The city, through its city engineer, with a black shown as qualified, has selected that black largely in recognition of the goals and objectives that are encompassed in the consent decree.

The consent decree represented a compromise between various parties, black employees, the United States, the City's Personnel Board to resolve differences as to whether blacks had over the years been discriminated against and prevented from employment opportunities because of their race. The consent decree attempts to alleviate through settlement for the results of what was perceived to have been a consequence, although not an intended consequence, of

[Page 48]

the examination and certification process.

I'm going to deny the request for a temporary restraining order. The ultimate question presented, however, by this obviously is an issue that is before the Court of Appeals; namely, is the consent decree fully valid and should it be recognized? I don't see an abuse of the consent decree here. The question is whether the consent decree, which has after hearing been approved, should on appeal be approved. Until there be some reversal by the Court of Appeals, I am of the view that the consent decree is valid.

In this particular case, I see no abuse of that consent decree, even though it may be that the selection of Mr. Thomas was not mandated by that decree. The application for temporary restraining order is denied.

As was noted by one of the counsel, it may well be that this does not moot this case and that there may be, subject to further development, a case at least for backpay or for preferential treatment on the next vacancy. That is a matter that I am not faced with at this point; only the question of the temporary restraining order.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

I. MOTION TO DISMISS OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to issue (i) an order dismissing the complaint or, alternatively, (ii) an order granting summary judgment in favor of these defendants on the following grounds, separately and severally assigned:

1. To the extent this action is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., plaintiffs have failed to satisfy the necessary statutory conditions precedent to suit. Plaintiffs, or any of them, failed to aver that charges of employment discrimination had been filed with the Equal Employment Opportunity Commission. Moreover, they failed to aver receipt of "Right to Sue" letters from the Commission authorizing commencement of an action under Title VII.

2. This action is an impermissible collateral attack on the Consent Decrees in *United States of America v. Jefferson County*, Civil Action Nos. 75-P-0666-S, 74-Z-17-S, 74-Z-12-S. To the extent plaintiffs seek to contest the implementation of these Decrees, plaintiffs' exclusive remedy is to petition the Court for relief under the Decrees.

3. To the extent this action is predicated upon the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.§1221, et seq., plaintiffs have failed to satisfy the statutory conditions precedent to suit. Specifically, plaintiffs have failed to exhaust their administrative remedies as required by 31 U.S.C.§1244(a).

4. To the extent this action is predicated upon the Omnibus Crime Control and Safe Streets Act of 1968, as amended, this Court lacks jurisdiction of plaintiffs' claims on the grounds that plaintiffs are not "persons aggrieved" under 42 U.S.C.§3789d(c)(4)(A).

5. To the extent this action is predicated upon the Omnibus Crime Control and Safe Streets Act of 1968, as amended, plaintiffs have failed to satisfy the statutory conditions precedent to suit in that they have failed to exhaust their administrative remedies as required by 42 U.S.C.§3789d(c)(4)(A).

6. Plaintiffs' claims fail to state a cause of action upon which relief may be granted against these defendants.

7. This Court lacks subject matter jurisdiction of plaintiffs' complaint.

8. There are no genuine issues of material fact and these defendants are entitled to a judgment in their favor as a matter of law. Specifically, the undisputed evidence presented at the hearing on the plaintiffs' motion for a temporary restraining order shows: (a) Lucius Thomas was well qualified for the position of Civil Engineer, (b) the competing white candidates for promotion to that position were not demonstrably better qualified than Mr. Thomas, (c) the City of Birmingham has not met its long term goal for placement of blacks in positions in the Engineering Department, and (d) the promotion of Thomas to the position of Civil Engineer was in accordance with the provisions of the Consent Decrees.

WHEREFORE, defendants Richard Arrington,Jr. and the City of Birmingham request the Court to issue an order dismissing the complaint or alternatively an order granting summary judgment in favor of these defendants.

II. MOTION FOR AN AWARD OF COSTS AND ATTORNEYS' FEES

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to issue an order awarding them reasonable costs and attorneys' fees incurred in responding to the complaint on the following grounds:

1. The commencement of this action was unreasonable and vexatious.

2. Plaintiffs filed this suit in the face of a substantial body of case law establishing that they could properly obtain relief from the terms of the Consent Decrees only by filing a timely motion to intervene in *U.S. v. Jefferson County, et al.*, *Martin v. City of Birmingham*, and *Ensley Branch of the NAACP v. Seibels, et al.*

3. In *Bennett v. Arrington*, CV-82-P-0850-S, this Court previously rejected a virtually identical collateral attack to the Consent Decrees. Thus, it was clear at the outset that the maintenance of this action was without legal foundation.

4. It is clearly established in this Circuit that the granting of race conscious relief in order to eliminate the effects of past discrimination does not violate any provision of federal law.

5. Plaintiffs' [sic] knew, or should have known, that defendants did not act improperly under the Consent Decrees in connection with their action since they knew Mr. Thomas had "passed" the requisite examination and had been certified for promotion by the Jefferson County Personnel Board. Accordingly, this action was frivolously commenced and maintained.

6. An award of attorneys' fees will discourage plaintiffs and others similarly situated from commencement of additional frivolous litigation collaterally attacking the validity of the Consent Decrees.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Robert K. Spotswood
Robert K. Spotswood

Attorneys for Defendants

OF COUNSEL:

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[Certificate of Service, dated September 20, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

Motion to Dismiss or Alternatively
Motion for Summary Judgment

Defendant United States moves the Court to issue (i) an order dismissing the complaint or, alternatively, (ii) an order granting summary judgment in favor of all defendants on the following grounds:

1. This action constitutes an impermissible collateral attack on the lawfully entered Consent Decrees in *United States, et al.* v. *Jefferson County, et. al.*, Civil Action Nos. 75-P-0666-S, 74-P-0017-S, 74-P-0012-S, and it should therefore be dismissed for lack of subject matter jurisdiction in accordance with the recent decision of the Court of Appeals for the Eleventh Circuit in *Thaggard* v. *City of Jackson*, ____ F.2d ____ (11th Cir. Slip Opinion, September 27, 1982).

2. The ruling in *Thaggard* likewise requires the dismissal of the plaintiffs' complaint insofar as it alleges that the defendants City of Birmingham and Jefferson County Personnel Board are failing properly to implement the Consent Decrees. Such an allegation may only be brought before this Court by the plaintiffs following an application by them for permissive intervention to enforce the Consent Decrees in *United States, et al.* v. *Jefferson County, et al.*, consolidated actions, wherein the Court expressly retained jurisdiction over those actions to

ensure that the parties properly comply with the terms of the Consent Decrees.

3. To the extent plaintiffs' complaint is predicated upon a claim of racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, plaintiffs have failed to satisfy the necessary statutory conditions precedent to suit. Plaintiffs do not aver that charges of employment discrimination had been filed with the Equal Employment Opportunity Commission and they failed to aver receipt of "Right to Sue" letters from the EEOC, or other appropriate authority, authorizing commencement of an action under Title VII.

4. To the extent plaintiffs' complaint is predicated upon the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221, *et seq.*, and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. §§3766 *et seq.*, plaintiffs have failed to satisfy the statutory conditions precedent to suit under either of these statutes by first filing charges of discrimination with the administrative agencies authorized to investigate such charges, as required by 31 U.S.C. §1244(a) and 42 U.S.C. §§3789d(c)(4)(A).

5. Plaintiffs' complaint fails to state a cause of action upon which relief may be granted.

WHEREFORE, the defendant United States requests the Court to issue an order dismissing the complaint or, alternatively, granting summary judgment in favor of the defendants.

Respectfully submitted,

/s/ Richard J. Ritter

Richard J. Ritter
Attorney
Civil Rights Division
U. S. Department of Justice
Washington, D.C. 20530

[Certificate of Service, dated October 13, 1982, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

MOTION OF DEFENDANT-INTERVENORS TO DISMISS AND FOR ALLOWANCE OF COSTS

Defendant-intervenors John W. Martin, et al., move to dismiss the complaint upon the ground it fails to state a claim.

Defendant-intervenors ask that the plaintiffs be ordered to pay the defendant-intervenors their reasonable costs, including attorney's fees, for their defense of this action, upon the ground that plaintiffs' suit is frivolous and vexatious.

Respectfully submitted,

/s/ Stephen L. Spitz
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William L. Robinson
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Civil Rights Under Law
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Birmingham, Alabama 35203

Counsel for defendant-intervenors
John W. Martin, et al.

Dated: October 22, 1982

[Certificate of Service and memorandum omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, an unincorporated labor association, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

MOTION TO CONSOLIDATE

Plaintiffs move the Court to consolidate this action with the post-judgment actions pending in this Court styled *U.S.A. v. Jefferson County, et al.*, CV-75-P-0666-S, and related cases CV-74-Z-012-S, and CV-74-Z-017-S, for that:

1. These cases involve common questions of law and fact concerning the proper means by which the consent decrees are due to be implemented and whether the named plaintiffs were discriminated against on the basis of race in the particular incident made the basis of this suit.

2. Consolidation would further a more economical resolution of the issues in this case and those raised through the post-judgment Complaint in Intervention in *U.S.A. v. Jefferson County, et al.*

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Plaintiffs
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[Certificate of Service, dated August 4, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., as Mayor of the City of Birmingham; CITY OF BIRMINGHAM; RODERICK BEDDOW, JR., HENRY P. JOHNSTON and HIRAM Y. McKINNEY, as Members of the Jefferson County Personnel Board; and JEFFERSON COUNTY PERSONNEL BOARD,

Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

COMPLAINT

(1) This Court has jurisdiction of this action under 28 U.S.C. § 1343, 28 U.S.C. § 2201, 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964 and the Fifth and Fourteenth Amendments to the Constitution of the United States.

(2) Plaintiffs are all residents of Jefferson County, Alabama, and are over the age of twenty-one years.

(3) Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. 2000e(b).

(4) Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning and promoting of employees of the City.

(5) Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), is an employer within the meaning of 42 U.S.C. 2000e(b), as amended, and is engaged in the procuring and screening of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4) and in the administration of a civil service system for such defendants.

(6) Defendants Roderick Beddow, Jr., Henry P. Johnston and Hiram Y. McKinney are members of the Jefferson County Personnel Board, and as such they are responsible for its administration and operation, including the procuring and reviewing of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

(7) The defendant City of Birmingham is a recipient of revenue-sharing allocations from the United States Treasury pursuant to the provisions of the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221, *et seq.*), and a recipient of funds from the United States Department of Justice pursuant to the Omnibus Crime Control and Safe Street Act of 1968, as amended (42 U.S.C. 3701, *et seq.*).

(8) Plaintiffs are all white, male firefighter employees of the City of Birmingham. Pursuant to the provisions of the Personnel Board Enabling Act, the plaintiffs all have applied for, and taken the examination for, promotion to the classification of Fire Lieutenant of the Birmingham Fire Department. In partial discharge of their obligations under the Civil Service Act, the Personnel Board defendants, through their Director and other employees, ranked the persons who passed the Fire Lieutenant examination and were otherwise eligible for promotion under the provisions of the Civil Service Act. The plaintiffs are among the top-ranked candidates of the persons listed on the Register of Eligibles prepared pursuant to the January, 1982, Fire Lieutenant examination and the March, 1983, Fire Lieutenant examination.

(9) The City of Birmingham and Mayor Arrington have failed to promote plaintiffs Wilks and Chambers to the clas-

sification of Fire Lieutenant because of their race (white). The City intentionally promoted blacks on the basis of their race.

(10) The City of Birmingham and Mayor Arrington delayed promoting plaintiff Payne to the classification of Fire Lieutenant because of his race (white). Payne's promotion was delayed for several months because of his race.

(11) The Personnel Board defendants have illegally certified for promotion to the City of Birmingham and Arrington black persons who were in fact promoted to the classification of Fire Lieutenant on the basis of their race instead of the plaintiffs being so promoted.

(12) The defendants City of Birmingham and Arrington are following a policy of hiring and promoting their employees on the basis of race or color with black employees being employed, hired and promoted on the basis of their race in accord with numerical quotas, rather than purely upon merit and superior qualifications, all constituting illegal and unconstitutional discriminations against whites in hiring and employment practices. The black persons promoted instead of the plaintiffs were less qualified to perform the duties of a Fire Lieutenant than plaintiffs.

(13) The Personnel Board, its members and its Director are certifying candidates for hiring and promotion to the appointing authority on the basis of race, favoring blacks to the deference [sic] of whites, rather than in a color-blind fashion and solely on the basis of merit, competition and superior qualifications.

(14) The defendants' acts and practices described in the foregoing paragraphs constitute a pattern and practice of resistance to the full enjoyment of the rights of whites, and plaintiffs in particular, to equal employment opportunities within their jurisdictions and under their supervision and control. This pattern and practice is of such a nature and is intended to deny the full exercise of rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the

Fifth and Fourteenth Amendments to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

(15) Plaintiffs have received Right to Sue letters from the Equal Employment Opportunity Commission.

WHEREFORE, plaintiffs pray that defendants, their officials, agents, employees and all persons in active concert or participation with them be preliminarily and permanently enjoined from engaging in any discriminatory practice based on race or sex, and specifically from:

(a) Failing or refusing to recruit, hire, assign and promote white applicants and employees on an equal basis with black applicants and employees;

(b) Failing or refusing to recruit, hire, assign and promote male applicants and employees on an equal basis with female applicants and employees;

(c) Failing or refusing to eliminate qualifications and other selection standards which have not been shown to be job-related and which disproportionately exclude whites and males;

(d) Failing to certify plaintiffs as eligible candidates for promotion to Fire Lieutenant;

(e) Failing to strictly follow the certification and appointment provisions of the said Civil Service Act;

(f) Enforcing or complying with race-conscious promotional quotas.

Plaintiffs further pray that this Court will enter its declaratory judgment governing the rights, status and obligations of the parties. Plaintiffs further pray that this Court will enter its declaratory judgment concerning the legality and validity of the actions of defendants as described in this Complaint, and for such other related declaratory relief to which plaintiffs may be entitled.

Plaintiffs further pray for back pay, retroactive seniority, immediate certification and promotion, monetary and punitive damages, a reasonable attorney's fee for their counsel of record, and court costs.

Plaintiffs pray for such other alternative or general relief as to which they may be entitled.

/s/ Raymond P. Fitzpatrick, Jr.
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RONNIE J. CHAMBERS
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SERVE DEFENDANTS AT:

RICHARD ARRINGTON, JR., Mayor
City Hall
Birmingham, Alabama 35203

CITY OF BIRMINGHAM
City Hall
Birmingham, Alabama 35203

MEMBERS OF JEFFERSON COUNTY PERSONNEL BOARD and JEFFERSON COUNTY PERSONNEL BOARD
Room 301 Annex, Jefferson County Courthouse
Birmingham, Alabama 35263

[Certificate of Service, dated September 7, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER

For answer to the complaint herein, defendants Richard Arrington, Jr. and the City of Birmingham say as follows:

FIRST DEFENSE

The complaint fails to state a claim against these defendants upon which relief may be granted.

SECOND DEFENSE

Plaintiffs have failed to join parties in whose absence complete relief cannot be accorded.

THIRD DEFENSE

The complaint herein constitutes an impermissible collateral attack upon Consent Decrees entered by the United States District Court for the Northern District of Alabama in civil actions numbered 75-P-0666-S, 74-P-0012-S and 74-P-0017-S.

FOURTH DEFENSE

To the extent this action is predicated upon Title VII, it fails to state a claim in that it challenges promotion procedures established by a Consent Decree which procedures and decisions pursuant thereto are expressly protected from dis-

ciminatory [sic] challenge under Title VII, as interpreted by the Equal Employment Opportunity Commission.

FIFTH DEFENSE

This action is barred by laches.

SIXTH DEFENSE

For further answer to the complaint herein defendants Arrington and the City of Birmingham says as follows with respect to each paragraph of the complaint:

1. These defendants deny the allegations of paragraph 1 of the complaint.

2. These defendants admit the allegations of paragraph 2 of the complaint.

3. These defendants admit the allegations of paragraphs 3 and 4 of the complaint.

5. These defendants admit the allegations of paragraph 5 of the complaint, paragraph 6 of the complaint, as amended, and paragraph 7 of the complaint.

8. These defendants admit the allegations of paragraph 8 of the compliant.

9. These defendants deny the allegations of paragraphs 9, 10, 11, 12, 13 and 14 of the complaint.

15. With respect to the allegations of paragraph 15 of the complaint, these defendants are without sufficient knowledge, information or belief to form a judgment as to the truth or accuracy thereof and, accordingly, deny those allegations.

16. Except as herein expressly admitted, these defendants deny the allegations of the complaint.

17. The defendants deny that plaintiffs are entitled to any relief whatsoever.

WHEREFORE, these defendants demand a judgment be entered in their behalf and that they be awarded costs and

attorney's fees in defense of this frivolous and unfounded complaints [sic].

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander
Attorneys for Defendants
Arrington and the City of
Birmingham

OF COUNSEL:

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[Certificate of Service, dated September 28, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO REASSIGN

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to reassign this case from The Honorable William Acker, United States District Judge, to The Honorable Sam C. Pointer, Jr. United States District Judge in order to avoid the possibility of conflict and inconsistent interpretation of Consent Decrees. As grounds for reassignment, these defendants show the Court as follows:

1. The complaint herein, on statutory and Constitutional grounds, challenges referral practices of the Jefferson County Personnel Board and the promotion practices of the defendant City of Birmingham. These practices are the subject of existing Consent Decree in force and effect in this Court.

2. Defendants City of Birmingham and Jefferson County Personnel Board entered into companion consent decrees in August 1981 in civil actions numbered 75-P-0666-S, 74-P-0012-S and 74-P-0017-S. The consent decrees govern both referral and selection decisions in substantial part.

3. Judge Pointer has retained jurisdiction over these decrees and has routinely and regularly been involved in construing those decrees and resolving specific challenges to implementation decisions. Judge Pointer is presiding over related litigation. *BACE, et al.* v. *Arrington, et al.*, CV 82-P-1852-S;

Garner, et al. v. *City of Birmingham*, CV 82-P-1461-S; *Bennett* v. *Arrington*, CV-P-0850-S.

4. Although the instant lawsuit does not specifically reference the decrees, it is one of a number of challenges filed by the employee associations, and their counsel.

WHEREFORE, in order to avoid the possibility of conflicting or inconsistent interpretations to the decrees, the defendant City of Birmingham and Richard Arrington, Jr. move that this case be reassigned.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

Attorneys for Defendants
Richard Arrington and
the City of Birmingham

OF COUNSEL:

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(205) 252-4500

[Certificate of Service, dated September 28, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ORDER

The judge of this Court to whom this case has routinely been assigned is unaware of any rule which would permit him to reassign a case to another judge of the Court, much less to a particular judge requested by a party. Therefore, finding the motion to reassign filed by certain defendants not well taken, the said motion is hereby DENIED.

If at a later time the undersigned determines that any consent decree entered by another judge of this Court is controlling and requires interpretation, the undersigned will face the issue at that time.

DONE this 30th day of September, 1983.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER

Come now the defendants, Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., and the Personnel Board of Jefferson County (the above-named defendants will be collectively referred to hereafter as the "Board") and answer the identically numbered paragraphs of plaintiffs' complaint as follows:

1. The Board admits that this Court has jurisdiction over this case under the stated statutory sections, but denies that it has taken any actions that violate any of plaintiffs' rights.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. The Board admits that Hiram Y. McKinney, James B. Johnson, and Roderick Beddow, Jr., are members of the Personnel Board of Jefferson County, and as such, they are responsible generally for its administration and operation, including the procuring and reviewing of applicants and certification of eligibles for appointment with defendants named in paragraphs (3) and (4).

7. The Board relies upon the answers of the defendant City of Birmingham in regard to this averment.

8. Admitted.

9. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

10. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

11. Denied.

12. The Board is without sufficient knowledge to admit or deny the averments of this paragraph.

13. The Board entered into a Consent Decree which was approved by the United States District Court for the Northern District of Alabama, Southern Division, in Case No. CV-75-P-0666-S, and has made race conscious certifications pursuant to this Consent Decree, as is required by the Consent Decree. As such, qualifications are now no longer made "solely on the basis of merit, competition and superior qualifications." If these actions by the Board are deemed to be favoring blacks to the detriment of whites then the Board admits the averments of paragraph 13 of the complaint. Otherwise, the Board denies the averments of Paragraph 13.

14. The Board admits that it will continue to pursue the policies and practices in accordance with the Personnel Board's Enabling Act and Consent Decree. The Board denies the remaining averments of this paragraph.

15. The Board is without sufficient knowledge to admit or deny the averments of this paragraph. The Board denies that the plaintiffs are entitled to any relief against the Board.

DEFENSES

16. All of the actions taken by the Board concerning the above-referenced averments were taken pursuant to and in accordance with the Consent Decree entered by the United States District Court for the Northern District of Alabama, Case

No. CV-75-P-0666-S, and related cases, and therefore the Board is not liable for any acts complained of therein.

17. This complaint is barred by the doctrine of collateral estoppel.

18. This complaint is barred by the doctrine of res judicata.

19. All of the actions referred to above that were taken by the Board were taken in full conformity with all applicable constitutional provisions, statutes, laws, regulations, and court orders and decrees.

20. All of the Board's actions were made in accordance with the validly approved Consent Decree. Since all of the Board's actions were taken in accord with the validly approved Consent Decree, the Board is immune from liability for its actions made pursuant thereto. As the Consent Decree permits and requires race conscious selection procedures and practices, the Board is immune from liability even though it uses race conscious selection procedures and practices.

/s/ David P. Whiteside, Jr.
David P. Whiteside, Jr.

/s/ Michael L. Hall
Michael L. Hall

Attorneys for Defendants, the
Personnel Board and its Members

OF COUNSEL:

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[Certificate of Service, dated October 18, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO CONSOLIDATE

Defendants Richard Arrington, Jr. and the City of Birmingham move the Court to consolidate the case of *Wilks, et al v. Arrington, et al.*, Civil Action No. CV-83-AR-2116-S with the pending cases of *United States of America v. Jefferson County*, Civil Action Nos. CV-75-P-0666-S, et al. As grounds therefor, defendants City of Birmingham and Arrington show the Court as follows:

1. The defendant City of Birmingham has entered into a consent decree in *U.S. v. Jefferson County, supra*, and the Court in *U.S. v. Jefferson County* retains jurisdiction over that decree, as well as a companion decree with the Jefferson County Personnel Board, and has routinely construed those decrees, resolved specific challenges by third parties to implementation decisions, and resolved disputes among the parties. Judge Pointer is presiding over the consent decrees as well as related litigation which, like this case, attacks race and gender conscious relief. *BACE, et al. v. Arrington, et al.*, CV 82-P-1852-S; *Garner, et al. v. City of Birmingham*, CV 82-P-1461-S; *Bennett v. Arrington*, CV P-0850-S.

2. The plaintiffs' complaint, as amended, challenges hiring and promotion in accord with "numerical quotas". Plaintiffs also challenge race and gender-conscious certification by the local civil service board. Both the adoption of quotas and the special referral provisions are part of the relief afforded by the consent decrees in case No. 75-P-0666-S, 74-P-0017-S and 74-P-0012-S.

3. The consent decree with the City of Birmingham in Case Nos. 75-P-0666-S, et al. provides in part:

Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and §1983, and the Fourteenth Amendment to the Constitution of the United States as raised by the plaintiffs' complaints. . . . (Para. 54)

It further provides:

Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h)(J). . . . (Para. 3)

Accordingly, any ruling on the relief sought herein necessarily must involve construction of these and, perhaps, other provisions in Consent Decree.

4. By this action, plaintiffs seek to reform, modify, set aside or otherwise impair relief agreed to by the parties and approved by the Court in Case Nos. 75-P-0666-S, et al. That is, the relief which they seek necessarily conflicts with the existing orders of this Court in other cases. See Prayer for Relief paragraphs (e) and (f).

5. Consolidation would achieve economy of judicial effort and avoid the possibility of two conflicting findings and legal determination by two judges. See *Blair v. City of Greenville*, 649 F.2d 365 (5th Cir. 1981); *Compania Espanola de Pet., S.A. v. Nereus Ship.*, 527 F.2d 966 (2nd Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

6. Consolidation would avoid unnecessary expense, delay and duplication. See 9 C. Wright & A. Miller, *Federal Practice and Procedure*: Civic § 2383 at 259 (1979), *Bolling v. Miss. Paper Co.*, 86 F.R.D. 6 (N.D. Ms. 1979); *Grimes v. KECO*, 22 F.E.P. Cases 484 (S.D. Ohio 1976). Cf. *King v. Ralston Purina Co.*, 31 F.E.P. Cases 373 (W.D.N.C. 1983); *King v. Pepsi-Cola Metropolitan Bottling Co.*, 86 F.R.D. 4 (E.D. Pa. 1979).

7. This action involves a common question of law and closely related facts with Case Nos. 75-P-0666-S, et al. See, *Blair v. City of Greenville, supra*; *Nettles v. General Accident Fire & Life Assur. Corp.*, 234 F.2d 243 (5th Cir. 1956); *Kershaw v. Sterling Drug., Inc.*, 415 F.2d 1009 (5th Cir. 1969); *Compania Espanola de Pet., S.A. v. Nereus Ship., supra*. The City of Birmingham has expressly relied upon the provisions of the Consent Decree in making the decisions challenged in this case.

8. None of the factors requiring denial of consolidation is present; consolidation is typically denied where no common question of law or fact is involved; if the parties would not be adequately protected; if consolidation would lead to confusion and prejudice or where consolidation would not effect any appreciable saving of time or expense. See 5 *Moore's Fed. Practice*, Para. 42.02[3] at pp. 42-22 through 42-45 and cases cited therein; *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976).

WHEREFORE, in order to avoid the possibility of conflicting or inconsistent interpretation to the decrees, the defendants City of Birmingham and Arrington pray that the Court enter an Order consolidating this case with Civil Action Nos. 75-P-0666-S, et al.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

Attorneys for Defendant
City of Birmingham

OF COUNSEL:

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(205) 252-4500

[Certificate of Service, dated October 27, 1983, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

PLAINTIFF'S OPPOSITION TO
MOTION TO CONSOLIDATE

Plaintiffs hereby state the following in Opposition to the Motion to Consolidate:

(1) Plaintiffs, or their privies, have yet to be able to obtain full party status in *U.S.A.* vs. *Jefferson County, et al.* CV-75-666-S, and related cases 74-Z-012-S, and 74-Z-017-S, which the defendants now seek to consolidate this case with. It is indeed incredible that the defendants have continually asserted that non-minority employees have no standing in *U.S.A.* vs. *Jefferson County*, yet now seek to consolidate these two cases.

(2) This action will not require any interpretation of any consent decree entered in any other case. Neither plaintiffs, nor their privies, were parties to the consent decrees in *U.S.A.* vs. *Jefferson County*. The fact that the defendants have plead [sic] the prior judgment as a defense in this case does not mitigate in favor of a consolidation.

(3) There are no common questions of law or fact to be determined in *U.S.A.* vs. *Jefferson County*. There are no active trial proceedings taking place in that case at this time.

(4) At issue in this case are simple yet important questions of whether the defendants have violated the civil rights of

these plaintiffs. If these defendants are pleading a prior judgment as a defense, then any Judge of this Court is fully capable of determining the validity of such a defense.

(5) Because neither plaintiffs, nor their privies, are parties to the Consent Decrees entered in *U.S.A.* vs. *Jefferson County* upon which these defendants rely, said decrees are not enforceable against these plaintiffs and are not in need of any construction in this case. *See, W. R. Grace & Co.* vs. *Local Union 759*,____ U.S.____, 51 U.S.L.W. 4643 (May 31, 1983); and *E.E.O.C.* vs. *Safeway Stores, Inc.*,____ F.2d ____, 32 EPD ¶33,815 (5th Cir. Sept. 16, 1983).

(6) This action is not a collateral attack on any prior judgment.

(7) Consolidation would unnecessarily delay and frustrate an economical and swift adjudication of plaintiffs' claims.

(8) The moving defendants have failed to file the Motion to Consolidate in *U.S.A.* vs. *Jefferson County*, CV-75-P-0666-S.

(9) No other Judge of this Court has consolidated any prior litigation challenging employment practices of any *U.S.A.* vs. *Jefferson County, et al.*, Consent Decree party with said case.

(10) A consolidation will not save judicial resources nor avoid overlapping trials of duplicative proof.

WHEREFORE, plaintiffs respectively urge the Court to deny the Motion to Consolidate and deny any further actions to transfer this case.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated October 31, 1983, omitted]

NOS. 81-7761, 82-7129

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFERSON COUNTY, *et al.*,

Defendants-Appellees.

JOHN W. MARTIN, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF BIRMINGHAM, *et al.*,

Defendants-Appellees.

ENSLEY BRANCH OF THE N.A.A.C.P., *et al.*,

Plaintiffs-Appellees,

v.

GEORGE SEIBELS, *et al.*,

Defendants-Appellees.

BIRMINGHAM FIREFIGHTERS ASSOCIATION 117,

Proposed Intervenor- Appellant.

JAMES A. BENNETT, *et al.*,

Plaintiffs-Appellants,

v.

RICHARD ARRINGTON, JR., *etc.*, *et al.*,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Dec. 12, 1983.

Rehearing and Rehearing En Banc
Denied Jan. 20, 1984.

Appeals from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

In January 1974 the Ensley Branch of the NAACP[1] and John Martin[2] each filed a separate class action complaint in the district court against the Jefferson County, Alabama, Personnel Board (Board) and the City of Birmingham, Alabama (City). They alleged that the Board and the City violated, inter alia, Title VII of the Civil Rights Act[3] through racially discriminatory hiring and promotion in various public service jobs, including firefighters.[4] In May 1975, the United States

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1. The Ensley Branch of the NAACP is a membership organization of black citizens of Birmingham, Alabama. It, along with three black males who had applied for positions with the City of Birmingham, Alabama, and taken tests administered by the Jefferson County, Alabama, Personnel Board, filed a class action complaint against the City, George Seibels, Jr., then Mayor of Birmingham, the Board, the three members of the Board and the director of the Board. Of these parties, only the plaintiffs, the City, the Mayor (now Richard Arrington), and the Board are parties in this appeal. *See infra* notes 7 & 8.

2. John Martin is a black male who applied for a position with the City of Birmingham and was certified by the Jefferson County Personnel Board but rejected by the City. He and six other black applicants for employment with the City, or City employees denied promotion, filed a class action against the defendants named in the suit brought by the Ensley Branch of the NAACP, and three Jefferson County Commissioners who plaintiffs alleged were responsible for Board activities. Only the plaintiffs, the City, the Mayor, and the Board are parties in this appeal. *See infra* notes 7 & 8.

3. The plaintiffs alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2000e-17 (1976 & Supp. V 1981), as amended by the Equal Employment Opportunity Act of 1972 (Pub.L. 92-261, March 24, 1972); 42 U.S.C. § 1981 (1976), providing for equal rights for all persons within the United States to make contracts; 42 U.S.C. § 1983 (1976 & Supp. V 1981), to redress deprivation under color of law of rights, privileges and immunities secured by the equal protection clause of the fourteenth amendment.

4. The Board and the City share responsibility for public sector hiring in the City in the following manner. The Board administers examinations to applicants for classified City employee positions, adopts rules and

also filed a complaint in the district court alleging similar discrimination against blacks and women by the Board and the City.[5]

These three cases were consolidated for discovery and trial purposes. In December 1976, the district court held a bench trial limited to the issue of the validity of the written tests used by the Board and the City to screen police and firefighter applicants. The court found that the tests had a severe adverse impact on black applicants and concluded that the tests therefore violated Title VII. The court directed entry of final judgment for the plaintiffs on this issue, pursuant to Fed.R.Civ.P. 54(b), and the defendants appealed. While their appeal was pending, the district court tried the remaining claims pending against the Board only.

After we ruled on the district court's decision concerning the written tests, *Ensley Branch of NAACP v. Seibels*, 616 F.2d 812 (5th Cir.) *cert. denied sub nom. Personnel Board v. United States*, 449 U.S. 1061, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980),[6] the plaintiffs, in all three cases, entered into extensive negotiations with the Board and the City which culminated in two proposed consent decrees, one with the Board[7] and one with the City.[8] The former disposed of all of the plaintiffs' claims

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regulations governing the operation of the civil service system, and administers the system in Jefferson County. The Board certifies to the appointing authority, the City, the names of three eligible applicants for an open position. The City then chooses an employee. Classified positions include all full-time City jobs except common laborers, judicial officers, elected officials, and a few executive positions.

5. The United States in its suit added to the claims stated in the other cases violations of the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1221 (1976), and Omnibus Crime Control and Safe Streets Act of 1968, as amended, former 42 U.S.C. § 3766(c)(1) (1976).

6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

7. The Board was the only defendant executing the consent decree. The plaintiffs abandoned their claims against the other county defendants. *See supra* notes 1 and 2.

8. The City was the only defendant executing the consent decree although the Mayor was referred to in the decree as a party to the settlement.

against the Board; the latter disposed of all the plaintiffs' claims against the City. The two consent decrees incorporated some affirmative action remedies in hiring and promotional policies.[9]

The court provisionally approved these consent decrees in June 1981, but reserved final approval until it convened a fairness hearing to consider the objections of all interested parties. The court held that hearing in August 1981, at which it considered, among others, the objections filed by the Birmingham Firefighters Association 117 (BFA),[10] as amicus curiae. The day after the hearing, BFA and two of its members (BFA members) moved, pursuant to Fed.R.Civ.P. 24(a), to intervene of right in each of the three cases, contending that the proposed consent decrees would have a substantial adverse impact upon them. The court denied their motions as untimely, and approved, and entered, both consent decrees.

Seven individual white male firefighters (Firefighters) then filed a complaint in the district court against the Board and the City[11] to enjoin the enforcement of the consent decrees on the ground that the operation of the decrees would discriminate against them in violation of Title VII of the Civil Rights Act. They applied for a preliminary injunction, which, after a hearing, the district court denied.

The BFA members and the Firefighters then appealed from the court's denials of the motion to intervene and the

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9. The consent decrees set forth an extensive scheme of remedies: injunctions against further discrimination on the basis of race or sex and against retaliatory measures by the defendants against members of the plaintiff classes; goals for the recruitment and hiring of blacks and women to correct the effects of past discrimination; and some awards of back pay to class members allegedly discriminated against during a several year period prior to the entry of the decrees.

10. The Birmingham Firefighters Association 117 is a labor association of firefighters employed by the City. It represents the interests of the majority of the City-employed firefighters and negotiates on their behalf with the City.

11. The white male firefighters, none of whom were in the BFA members group, also named as defendants Richard Arrington, Mayor of the City, the members of the Board, and the Director of the Board. None of these additional defendants are parties in this appeal.

preliminary injunction. We note provisional jurisdiction to review the denial of the motion to intervene, under our "anomalous rule";[12] if we find the motion to have been properly denied, we must dismiss for lack of jurisdiction. We note jurisdiction, pursuant to 28 U.S.C. § 1292(a)(1) (1976), to review the denial of the preliminary injunction.

I.

The district court denied the BFA members' motion to intervene on the ground that it was untimely filed. The question of timeliness is largely committed to the district court's discretion; therefore, we review the court's action only for an abuse of discretion. *Howse v. S/V "Canada Goose I"*, 641 F.2d 317, 320 (5th Cir. Unit B 1981); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977).

A district court must consider four factors in assessing timeliness, namely (1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew

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12. *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977) sets forth our rule:

> Under this circuit's "anomalous rule",[7] governing the appealability of orders denying intervention, we have provisional jurisdiction to determine whether the district court erroneously concluded that the appellants were not entitled to intervene of right under section (a) of Rule 24, or clearly abused its discretion in denying their application for permissive intervention under section (b) of Rule 24. If we find that the district court's disposition of the petitions was correct, or within the ambit of its discretion, then our jurisdiction evaporates because the proper denial of leave to intervene is not a final decision, and we must dismiss these appeals for want of jurisdiction. But if we find that the district court was mistaken or clearly abused its discretion, then we retain jurisdiction and must reverse. In either event, we are authorized to decide whether the petitions for leave to intervene were properly denied.

(Citations omitted.) Footnote 7 in the above statement cites criticism of this rule, advocating a simple review of the denial of intervention as a final order. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1923 (1972).

or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Stallworth*, 558 F.2d at 264-66. This analysis applies whether intervention of right or permissive intervention under Fed.R.Civ.P. 24 is claimed. *Id.*, citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 387, 97 S.Ct. 2464, 2466, 53 L.Ed.2d 423 (1977); *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648 (1973); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir.1970).

Under the first factor of the timeliness test, the district court correctly concluded that the BFA members did not act seasonably. The BFA members contend that their motion was timely because they filed it just as soon as they discovered that they might be adversely affected by a final adjudication of the plaintiffs' claims in these cases. It is true, as we said in *Stallworth*, that mere knowledge of the pendency of an action, without appreciation of the potential adverse effect an adjudication of that action might have on one's interests, does not preclude intervention. The BFA members, however, knew at an early stage in the proceedings that their rights could be adversely affected, as was evidenced by their conversations with the City regarding the tactics the City should take in defending the action; yet they failed to seek intervention.

The BFA members contend that their failure to move to intervene was justified, and therefore should have been excused, because they were entitled to assume that the City and the Board would protect their interests. There are, of course, certain circumstances under which one is entitled to assume that a party will protect one's interests. The Supreme Court made this clear in *United Airlines*, which the BFA members argue controls this case. There, a stewardess filed a class action contesting a no-marriage rule that United applied only to female employees. The district court refused to certify a class, and the stewardess failed to appeal. Another stewardess moved the district court for leave to intervene in order to file the appeal. The district court denied her motion, and she appealed from that denial. The Court of Appeals reversed, with instructions to

permit intervention on remand, and the Supreme Court affirmed. The Supreme Court justified the failure of the second stewardess to move to intervene earlier because "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representative, she promptly moved to intervene . . . ." *Id.* 432 U.S. at 394, 97 S.Ct. at 2470. The Court thus recognized that the second stewardess had the right to rely on the first to represent her.

The BFA members had no identity of interest with the City in the way that the unnamed class member shared an interest with the named class representative in *United Airlines*. From the beginning, the Board and the City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members. Thus, the mere fact that the Board and the City made a settlement allegedly adverse to the interests of BFA members does not mean that they "changed their position and became adverse" as the BFA members alleged in their motion to intervene. Rather, it underscores the variance in interest that existed when the litigation commenced. BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain.

Under the second factor of the timeliness test, the district court was required to consider "how much prejudice would result [to the existing parties] from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Stallworth*, 558 F.2d at 267. The BFA members knew of their interest in these cases prior to the first trial. They could have moved to intervene then, but chose to wait until after two trials and a long complex negotiation process had taken place. The court's grant of their motion to intervene would plainly have prejudiced the existing parties, since it would have nullified these negotiations with the Board and allowed a pattern of past discriminatory practices to continue.

The third factor of the test required the court to consider whether the BFA members would be prejudiced if denied inter-

vention. Prejudice, as the term is used in this context, originally referred to a consideration of whether the would-be intervenor sought intervention under Fed.R.Civ.P. 24(a) (intervention of right) or rule 24(b) (permissive intervention). *Stallworth*, 558 F.2d at 265, 266. Rule 24(a) expresses a concern for the extent to which a nonparty risks his interest in the property or transaction involved in the action unless his interest is adequately represented by existing parties. Rule 24(b) expresses a similar concern where the nonparty may have a common question of law or fact determined to his disadvantage. *Stallworth* expands the rule 24(a) or rule 24(b) inquiry to allow "varying degrees of harm among intervenors of the same type to be taken under consideration." 558 F.2d at 266. However, the discussion in *Stallworth* still indicates that the thrust of the inquiry must be the extent to which a final judgment in the case may bind the movant even though he is not adequately represented by an existing party. We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party that the party's representation may be inadequate to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.[13]

We therefore proceed to consider the extent to which it appeared to the district court that the BFA members might be bound by the consent decrees in these cases. We have not yet been called upon to rule on the preclusive effect a consent decree in a Title VII case might have on one subsequently claim-

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13. The burdens of cost and delay the would-be intervenor would suffer if required to bring a future lawsuit do not constitute prejudice under the third *Stallworth* factor. He would have those burdens at any time he sought to enforce his rights in court. He is merely getting a free ride if the court allows intervention. Naturally, the court can order the intervenor to pay his share of costs if it grants the motion, so the financial "gain" of intervening is by no means certain.

ing reverse discrimination.[14] Other circuits have faced the issue,[15] but the results of these cases are sufficiently unclear to warrant careful discussion here.

The principles of res judicata and collateral estoppel apply to consent decrees as well as to ordinary judgments entered by a court.[16] These doctrines prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of interests with such parties that their interests are deemed to have been litigated in those proceedings. A final judgment may not, however, bind a nonparty when his interests were not represented; thus, situations can arise where a judgment purporting to affect a nonparty must not be applied to him. There are, additionally, limitations on the extent to which a nonparty can undermine a prior judgment. A nonparty may not reopen the case and relitigate the merits anew; neither may he destroy the validity of the judgment between the parties.

In applying these principles to consent decrees, some courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree.[17] We do not follow this path

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14. The opinions in *Thaggard v. City of Jackson*, 618 F.2d 272 (5th Cir. 1980), and *United States v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980), which dealt with these issues, were both later vacated on other grounds.

15. *See infra* note 17.

16. This discussion assumes that consent decrees and judgments are equivalent for res judicata and collateral estoppel purposes. Some courts give consent decrees such preclusive effects; others do not. For a discussion of the rationales for giving consent decrees less preclusive effect than an ordinary judgment, namely, that the merits are not fully litigated, see 1B Moore on Federal Practice § 444(3) (2d ed. (1983)).

17. This idea arose from a spate of cases finding, in specific circumstances, that the plaintiff's collateral attack on the prior judgment was impermissible. *See, e.g., Black and White Children of the Pontiac School System v. School Dist.*, 464 F.2d 1030 (6th Cir. 1972) (stating that a suit seeking injunction against enforcement of a busing order on the ground of unforeseen difficulty should have been brought as a suit to modify the order in the original court.); *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.) *aff'd* 573 F.2d 1294 (2d Cir. 1977) (refusing to allow an attack on the merits of the judgment); *Oburn v. Shapp*, 70 F.R.D. 549 (E.D.Pa) *aff'd* 546 F.2d 417 (3d Cir. 1976) *cert. denied* 430 U.S. 968, 97 S.Ct. 1650, 52 L.Ed.2d 359 (1977).

to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights. If we refuse to hear a discrimination claim by a person whose interests are not represented in the decree, we create an exception to the limitations we presently place on res judicata and collateral estoppel. We should not undertake such action lightly. Naturally, that the employer undertook the challenged action pursuant to a court-approved consent decree or a valid affirmative action plan (see, e.g. *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979)), would be evidence of nondiscriminatory intent by the employer, and the nonparty could not seek to relitigate the merits or reasonableness of the decree vis-a-vis the parties to the decree.

In their motion to intervene, the BFA members could not have alleged that they had suffered any reverse discrimination as a result of the Board's or the City's implementation of the affirmative action plan prescribed by the consent decrees, because the court had not yet approved those decrees. BFA members could present such a claim now, however, since the decrees have been approved and entered. For example, they could do so by instituting an independent Title VII suit, asserting the specific violations of their rights. The consent decrees would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree.[18] If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. One of the prime reasons why a trial judge must proceed with caution and circumspection in approving consent decrees,[19] especially when the interests of all who may be af-

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At some point, these cases began to be cited for the proposition that all collateral burdens on a consent decree are per se impermissible. *See, e.g., Dennison v. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981).

18. It should be clear from this discussion that it is not necessary for the BFA members to make a frontal attack on the validity of the decrees between the parties in order to assert a discrimination claim against their employers.

19. The judge must be cautious in approving consent decrees only to the extent that he should be aware the decree is more likely to be of little ef-

fected by the decree are not adequately represented, is to avoid this very question. We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Since we assume that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully, we hold that the district court was justified in finding no prejudice to the BFA members' rights in denying intervention.[20]

Finally, under the fourth timeliness factor, there are no mitigating circumstances as were present in *Stallworth*. There, when the defendants sought permission to inform the would-be intervenors of their rights at an earlier point in the litigation, the plaintiffs thwarted the attempt. When the would-be intervenors ultimately did move to intervene, plaintiffs complained that intervention should not be allowed because the motion was untimely. The court found the plaintiffs' problem to be partly of their own making and considered this as a factor in allowing intervention.

Considering the interests under the four-part test articulated in *Stallworth*, we find ample justification for the trial court's determination that intervention should be denied as untimely. The interests of finality of the litigation, the prejudice intervention would have caused the parties to the consent decrees, and the BFA members' early knowledge that their rights could be affected combined to support the trial judge's exercise of his discretion to deny the intervention here. The possibility that the BFA members might be prejudiced by the consent decrees in these cases does not outweigh these considerations. Because we conclude that the district judge did not abuse his discretion, and because the proper denial of a motion to intervene is not a final judgment, *United States v. United States Steel Corp.*, 548 F.2d 1232, 1236 (5th Cir. 1977), we dismiss the BFA members' appeal for lack of jurisdiction. We

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fect the fewer parties there are in the suit to be bound. The consent decree by definition only binds those who consent (either expressly or impliedly).

20. For a discussion paralleling this analysis, see *Ashley v. City of Jackson*, U.S., 104 S.Ct. 255, 78 L.Ed.2d 241 (1983) (Rehnquist, J. dissenting from denial of certiorari).

now consider the Firefighters' appeal from the district court's denial of their application for a preliminary injunction.

II.

The grant or denial of a preliminary injunction is a matter within the discretion of the district court, reviewable only for abuse of discretion or if contrary to some rule of equity. *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354 (11th Cir.1983). That discretion is guided by four prerequisites: the movant must show (1) a substantial likelihood that he will ultimately prevail on the merits; (2) that he will suffer irreparable injury unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *Id.* at 1354-5. The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant "clearly carries the burden of persuasion" as to the four prerequisites. *Canal Authority v. Callaway*, 489 F.2d 567 (5th Cir.1974). "The burden of persuasion in all of the four requirements is at all times upon the plaintiff." *Id.* at 573. Because the Firefighters did not carry the burden as to irreparable harm and, thus, were not entitled to a preliminary injunction, it is unnecessary to address the other prerequisites to such relief.[21]

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21. The Firefighters argue that we should be deciding their appeal on the merits because "the validity of the consent decrees is a legal question, as is the question of whether a collateral attack [on the consent decrees] will lie. The only conclusion of law entered by the district court on these issues was a finding that the attack is 'without merit.'" The only appealable judgment that has been entered in the case, however, is the denial of the preliminary injunction. While we may have the power in certain circumstances to consider a preliminary injunction appeal as if on the merits, *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 435 n. 6 (5th Cir. 1981), here, as in *Piedmont*, there was no agreement by the parties to consolidate this appeal with an appeal on the merits; indeed, appellants have not even expressly terminated their presentation of evidence. The judge considered his order a decision only on the preliminary injunction motion; it states that beyond the injunction, "the case is continued for further development and potential trial." Therefore we decline to reach the merits.

Firefighters, in their attempt to have us decide the merits of their case, point to cases in which the appellate court overturned a trial court's decision

While this court has indicated that it will presume irreparable harm in a Title VII case in which the employee has exhausted his administrative remedies (*Middleton-Keirn v. Stone*, 655 F.2d 609 (5th Cir.1981), Firefighters have not pursued such administrative remedies here. Hence, the presumption cannot apply. Moreover, Firefighters have made no showing of possible irreparable injury. Even if they eventually prevail on the merits, they will have suffered no injury that could not adequately be compensated through an award of back pay and seniority points along with compelled future promotion. As the Supreme Court stated in *Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 953, 39 L.Ed.2d 166 (1974) (citation omitted) (emphasis in original):

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

We find no abuse of discretion in the district court's denial of the preliminary injunction.

The appeal in No. 81-7761 is DISMISSED; in No. 82-7129, the district court is AFFIRMED.

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as to a preliminary injunction where the denial was based entirely on an erroneous view of the law. Whether the court's conclusion of law as to success on the merits is correct or not, we cannot review it in this case because Firefighters have not carried their burden to show irreparable harm. *See infra*, slip op. at 792-793. In this context, any pronouncement on Firefighters' chances of success on the merits would be gratuitous.

Obviously, where a preliminary injunction has been *granted* based on an error law even as to only *one* of the four prerequisites, the injunction must fall because the movant has not met his burden of persuasion on all four counts. Where the injunction is denied, the error of law would have to extend to every prerequisite on which the trial court found against the movant to warrant reversal. Firefighters should note that the trial judge's conclusions of law as well as his findings of fact at the preliminary injunction stage are not binding on him in his determination of the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*,

Plaintiffs,

v.

RICHARD ARRINGTON, JR., *et al.*,

Defendants.

CIVIL ACTION NO.
CV 83-AR-2116-S

ORDER

Defendants in this cause, Richard Arrington, Jr. and the City of Birmingham, have filed a Motion to Consolidate this case with the "pending case" *United States v. Jefferson County*, CV No. 75-P-0666-S. Defendants Hiram Y. McKinney, James B. Johnson and Roderick Beddow, Jr. and the Personnel Board of Jefferson County, have answered the complaint in this case without requesting consolidation. The Court has heard and considered arguments and briefs in support of and in opposition to the Motion to Consolidate.

In the first place, this motion is, in effect, no more than a repetition of the previous Motion to Reassign filed by the same defendants. That motion was denied on September 30, 1983. Since September 30, 1983, there has been no material change in the posture of the case.

In the second place, according to the Clerk, *United States v. Jefferson County*, CV 75-P-0666-S is not a "pending case", even though it is open for the purposes of implementation and monitoring compliance. It is, of course, true that the effect, if any, of the Consent Decree entered in CV 75-P-0666-S is, or may be, an issue in this case, but this fact alone does not compel consolidation, particularly inasmuch as the customary consolidation order is for trial purposes only, and there is no trial contemplated in CV 75-P-0666-S.

In the third place, the rationale for "at random" assignment of cases among the judges of The United States District Court for the Northern District of Alabama would be frustrated, and judge shopping would become the order of the day in certain types of cases, if parties are allowed to obtain consolidation of newly filed cases with previously filed or concluded cases because of the similarity of issues. The judge to whom this case has been routinely assigned may or may not be as well equipped to determine the issues here presented as are other judges of this Court, but "luck-of-the-draw" case assignments are premised, as they must be, on the assumption that every judge of this court can ascertain the applicable law and can fairly determine the pertinent facts. At least theoretically the undersigned can comprehend the decisions of other judges of this Court, as well as he can comprehend the decisions of the Eleventh Circuit and of the Supreme Court. The conflicting pull between judicial economy and a potential for conflicting judicial opinions on the one hand, and a policy of exposing litigants to a variety of judges on the other hand, must be resolved in favor of the random selection of judges. As stated in *United States v. Kelly*, 519 F. Supp. 1029, 1031 (D. Mass. 1981):

> [J]udges do not choose their cases, and litigants do not choose their judges. We all operate on a blind draw system. Sometimes, both litigants and judges are disappointed by the luck of the draw. But the possibility of such disappointment is a risk judges and litigants alike must assume . . .

An example of the problem which would be created by working exceptions to random selection of judges would be defendants in criminal cases attempting to flock to the undersigned judge because of his recent holding that the federal statute requiring victim restitution is unconstitutional, an opinion which is not necessarily shared by all other judges of this Court. The United States District Court for the Northern District of Alabama is not a monolith, nor is there any requirement that it become one. Inconsistencies in the rulings of district courts must await reconciliation in the system of federal appellate courts, including the Supreme Court.

Lastly, movants have not sought to controvert plaintiffs' assertion that defendants have succeeded in resisting plaintiffs' attempts to intervene in CV-75-P-0666-S, a position by defendants which seems inconsistent with their Motion to Consolidate.

For these separate and several reasons, defendants' motion is DENIED.

DONE this 13th day of December, 1983.

/s/ William M. Acker Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ANSWER OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, WANDA THOMAS, EUGENE THOMAS AND CHARLES HOWARD

In answer to each numbered paragraph of the complaint, the defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard admit, deny, and otherwise respond as follows:

1-7. Admit.

8-10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of these paragraphs.

11. Deny.

12. Defendants are without knowledge or information sufficient to form a belief as to whether black persons promoted instead of the plaintiffs were less qualified than the plaintiffs to perform the duties of a fire lieutenant. Defendants deny all other allegations.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

14. Deny.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of this averment.

FIRST AFFIRMATIVE DEFENSE

As a first affirmative defense, the defendant-intervenors allege:

1. In January 1974 the defendant-intervenors filed in this Court Civil Action No. 74-Z-0017-S (the "*Martin* suit") alleging that they and the members of a class of blacks which they represented were being discriminated against, upon the basis of their race, in employment by the City of Birmingham. In addition to other relief, the *Martin* suit prayed for an order requiring that blacks be hired and promoted in sufficient numbers to overcome the effects of past discrimination.

2. In June 1981, after extensive negotiation, the parties to the *Martin* suit submitted to this Court for its approval two proposed consent decrees, one disposing of all issues concerning the City of Birmingham and the other disposing of all issues concerning the Jefferson County Personnel Board. On August 21, 1981, this Court, after public notice of the proposed decrees and after a fairness hearing, approved and entered the proposed decrees.

3. The consent decrees in the *Martin* suit require the Personnel Board to certify and the City to employ qualified blacks in such numbers that the percentage of blacks employed in various described job categories will meet certain goals set forth in the consent decree with the City. In order to permit the City to meet these goals, the Personnel Board decree sets for the Board an annual goal of certifying, subject to the availability of qualified candidates, black applicants for certain named job classifications at rates no less than the certification goals set forth in the decree nor less than the percentage of blacks among the qualified applicants.

4. The above-described terms of the decrees require the Personnel Board, under some circumstances, to certify some qualified black applicants without regard to whether they are more or less qualified than some white applicants and re-

quire the City, if necessary to meet its hiring and promotional goals, to appoint such blacks.

5. Conduct of the City and the Personnel Board here complained of by the plaintiffs in their complaint is required of the City and the Personnel Board by the terms of the *Martin* consent decrees.

6. The consent decrees in *Martin* are valid final judgments of a court of competent jurisdiction and are not subject to collateral attack in this proceeding.

7. The claim herein is an impermissible collateral attack on the *Martin* decrees.

SECOND AFFIRMATIVE DEFENSE

As a second and separate affirmative defense, the defendant-intervenors allege:

1. They reallege each allegation of the first affirmative defense.

2. Each of the plaintiffs knew of the *Martin* suit soon after it was filed.

3. On January 10, 1977, this Court entered partial judgment for the plaintiffs in the *Martin* suit, based on a finding that two particular tests administered by the Personnel Board were racially discriminatory, and ordered that black applicants for positions in the Fire Department be processed in certain prescribed ratios, as compared to white applicants, until such time as the Board developed valid tests. The entry of this order had wide notoriety in the community and within the Fire Department and was at that time known, or should have been known, to the plaintiffs in this action.

4. Each of the plaintiffs had notice of the proposed consent decrees in the *Martin* suit and had prior notice of, and could have attended, this Court's fairness hearing of August 4, 1981, on the proposed decrees.

5. The effect of the *Martin* consent decrees on the conduct of the City and of the Personnel Board, which effect is here

complained of by the plaintiffs, was generally anticipated at the fairness hearing and should have been anticipated by the plaintiffs.

6. The plaintiffs' action is barred by laches.

WHEREFORE, defendant-intervenors pray that plaintiffs take nothing by their suit, that judgment be entered for the defendants and that defendant-intervenors be awarded their costs of suit and reasonable attorneys' fees.

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Attorneys for the Defendant-
Intervenors.

By: /s/ Susan Williams Reeves

February 9, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO INTERVENE AS PARTIES DEFENDANT

John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, both in their individual capacities and as representatives of a class of plaintiffs' in *John W. Martin, et al.* v. *City of Birmingham, et al.*, Civil Action No. 74-Z-0017-S, move to intervene in this action as a matter of right under Rule 24(a) of the Rules of Civil Procedure and to be permitted to intervene pursuant to Rule 24(b) of the Rules of Civil Procedure upon the following grounds:

1. The complaint in this action alleges that each plaintiff is a white, male firefighter employee of the City of Birmingham Fire Department who has applied for promotion within the Department, that the defendant Jefferson County Personnel Board has discriminated against the plaintiffs upon the basis of their race and sex by certifying blacks and women for appointment upon the basis of their race or sex, and that the defendant City has similarly discriminated against the plaintiffs by selecting blacks and women for promotion on the basis of their race or sex. The complaint prays that such conduct be enjoined.

2. The defendants have filed answers asserting, among other matters, that any consideration which they may have given to the race or sex of blacks and women in certifying

eligible candidates for promotion or in selecting from among such candidates has been pursuant to consent decrees previously entered by this Court in Civil Actions Nos. 75-P-0666-S, 74-Z-0012-S, and 74-Z-0017-S.

3. The claims and answers herein necessarily draw into question the meaning, application and validity of the consent decrees in Civil Action No. 74-Z-0017-S.

4. Movants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard are plaintiffs in Civil Action No. 74-Z-0017-S, titled *John V.* [sic] *Martin, et al.* v. *City of Birmingham, et al.*, and the class they represent are entitled to enjoy the benefits of the consent decrees therein entered.

5. The consent decrees in *John V.* [sic] *Martin, et al.* v. *City of Birmingham, et al.* are valid on their face and are not subject to collateral attack in this proceeding.

6. The interest of the movants, both on their own behalf and on behalf of the class they represent, in the integrity and proper implementation of the consent decrees in *John W. Martin, et al.* v. *City of Birmingham, et al.* is such that the relief sought in this action, if granted, may as a practical matter impair and impede the ability of the movants to protect that interest. None of the present parties to this action is a beneficiary of the terms of the consent judgments in *John W. Martin, et al.* v. *City of Birmingham, et al.* and none can adequately represent this action in the interest of the movants.

7. As appears more particularly from the attached Answer, which movants propose be filed if their Motion to Intervene is granted, the movants seek to assert defenses in this action that have questions of both law and fact in common with defenses asserted by the present defendants.

A proposed answer of the movants is attached.

Movants request oral argument of this motion.

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Attorneys for Movants

By /s/ Susan Williams Reeves

February 9, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

COMPLAINT IN INTERVENTION

Come now plaintiff-intervenors John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap and state the following as their Complaint:

(1) Intervenors adopt by reference the following paragraphs from the Complaint, as amended, of the original plaintiffs: (1), (2), (3), (4), (5), (6) as amended, (7), (8), (9), (10), (11), (12), (13), (14) and (15), and make the same allegations as therein contained on behalf of themselves, as well as the original plaintiffs.

(2) The City of Birmingham and Mayor Arrington have failed to promote plaintiff-intervenors Garvich, Henson and Millsap to the classification of Fire Lieutenant because of their race (white). The City intentionally promoted blacks on the basis of their race.

WHEREFORE, plaintiff-intervenors adopt by reference and make on behalf of themselves, as well as the original plaintiffs, the same prayer for relief as that set forth in the original Complaint, as amended.

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.
Attorney for Plaintiff-Intervenors
Garvich, Henson and Millsap
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[Certificate of Service, dated February 22, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MOTION TO INTERVENE

Comé now John E. Garvich, Jr., James W. Henson and Robert Bruce Millsap and respectfully move this Honorable Court for leave to intervene as parties plaintiff in this cause pursuant to Rules 24(a) and 24(b), Federal Rules of Civil Procedure. In support thereof, movants state:

(1) Movants are white male employees of the City of Birmingham Fire and Rescue Service. Movants present claims substantially identical to the claims of the original plaintiffs in this action in that movants were denied promotions to the classification of Fire Lieutenant on the basis of their race, and movants have been similarly damaged by the Personnel Board defendant's practices of certification on the basis of race.

(2) The movants claim an interest in the transactions which are the subject of this action in that movants seek to challenge as illegal and unconstitutional the actions of the defendants in the same manner as the original plaintiffs, the movants present the same arguments as the original plaintiffs, the movants have been victims of the same practices as the original defendants, and the movants seek relief similar to that of the original plaintiffs.

(3) Disposition of this action, without movants' participation may, as a practical matter, impair or impede the ability of movants to protect their interests.

(4) The interests of movants is not adequately represented by the original plaintiffs in that said parties may not adequately seek all relief available to the movants upon a finding of liability.

(5) The movants' claims present common questions of law and fact with the claims of the original plaintiffs.

(6) Movants have exhausted their administrative remedies and hold Right to Sue letters from the E.E.O.C.

(7) Filed herewith is a proposed Complaint in Intervention.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated February 22, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

OPPOSITION TO MOTION TO INTERVENE AS PARTIES DEFENDANT OF MARTIN, *ET AL.*

Plaintiffs oppose the Motion to Intervene of John W. Martin, et al., individually and as class representatives, for that:

(1) Said putative intervenors are without standing to contest the relief sought by plaintiffs. They have alleged no peculiar benefit they allegedly receive under "consent decrees" in any other case. Whether the defendants herein have discriminated or are engaging in a continuing policy of discrimination toward the plaintiffs is not a transaction or subject matter in which the putative intervenors have any interest.

(2) There has been no allegation that any of the putative intervenors are employees of the City of Birmingham or the Fire Department. There has been no allegation that said putative intervenors have any statutory, constitutional or contractual interest in the race-conscious promotional and referral policies of the defendants. On the contrary, plaintiffs allege that none of the putative intervenors are employees of the Fire Department or have any interest in Fire Department promotions.

(3) The movants have failed to allege in any manner their claim to act on behalf of a class, be it certified or alleged, so as to comply with Rule 23, Fed. Rules of Civ. Pro. There is no adequate description of the class of persons certified.

(4) Any peculiar relief provided to the movants and those whom they represent in *Martin* vs. *City of Birmingham*, CV-74-Z-0017-S, has been accepted and further claims by the movants have been released.

(5) The existing defendants are adequately representing the alleged interests of movants.

(6) Movants are not necessary parties to this action.

(7) Plaintiffs do not oppose the movants, or more correctly their counsel, appearing as *amici curiae* in order to state their views on racial quotas.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated February 22, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

SECOND OPPOSITION TO MOTION TO INTERVENE AS PARTIES DEFENDANT OF MARTIN, *ET AL.*

In further statement in opposition to the Motion to Intervene of Martin, et al., plaintiffs respectfully show unto this Honorable Court as follows:

(1) The actions of movants are clearly untimely. The movants have been aware of this case since shortly after the date on which it was filed and yet have taken no steps toward asserting their alleged interest until after discovery began and the case was set for pre-trial conference. *See*, letter of Ms. Susan W. Reeves to the Court dated November 14, 1983, which is attached hereto as Exhibit A. Extensive discovery has already been conducted and the Court has entered Orders concerning transfer and consolidation motions which the putative intervenors will probably seek to overturn. The prejudice to the existing parties will be significant.

On the other hand, denial of intervention to movants will cause no prejudicial effect to them because movants have no protectable interest which is the subject of this litigation. Should the movants be denied some peculiar benefit they enjoy under their consent decrees, they may seek to enforce such consent decrees by appropriate action in that litigation. Apparently, movants fail to accept that the Court of Appeals has ruled that the terms of their consent decrees are not binding on nonparties and cannot vitiate the statutory and constitutional rights

of persons not parties to a consent decree. *U. S. A.* vs. *Jefferson County*, 720 F.2d 1511 (11th Cir., Dec. 12, 1983); see, also, *W. R. Grace & Co.* vs. *Local Union 759, Etc.*, ___ U.S. ___, 51 U.S.L.W. 4643 (May 31, 1983); and, generally, Plaintiffs' Brief In Opposition To Motions To Transfer Or Consolidate (filed Dec. 2, 1983), and cases cited therein.

Under the four criteria of *Stallworth* vs. *Monsanto*, 558 F.2d 257 (5th Cir. 1977), the motion for intervention under Rules 24(a)(2) and 24(b) is untimely. Plaintiffs do not view their position as inconsistent with their approval of the announced intent of the United States to intervene as a party plaintiff, in that the United States has a statutory right to intervene under Rule 24(a)(1) and it will not be an obstacle to a speedy and inexpensive resolution of this litigation by seeking to overturn prior Orders entered in this case.

/s/ Raymond P. Fitzpatrick, Jr.
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[Certificate of Service, dated February 24, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS; CARLICE E. PAYNE and RONNIE J. CHAMBERS, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2480-S

The above-entitled matter came on to be heard before the Honorable William M. Acker, Jr., United States District Judge, on the 28th day of February, 1984.

* * *

[Page 23]

I would be glad to hear from you if you want to be heard today in support of the motion to intervene. But I will defer to Ms. Reeves as to how she wants to handle that and I will enter a formal order admitting them for that purpose.

MS. REEVES: Thank you, Your Honor. We are prepared and we did request oral argument on our motions.

Mr. Joffee [sic] is prepared to do that oral argument, but we thought it would be appropriate to respond to any questions

the Court might have if you have had an opportunity to read our brief.

THE COURT: I have read your brief and I have read what Mr. Fitzpatrick filed in response. I guess that there are several paradoxial [sic] aspects to this situation.

The one that I am thinking of right now is the successful resistance to intervention in the other case, which was spoken to by the 11th Circuit. Which just a cursory reading of it, of their opinion, seems to invite what Mr. Fitzpatrick has already done —

MR. JOFFEE [sic]: Yes, Your Honor. If I might

[Page 24]

respond to this. I think it did, and I think that is probably why we are here. But I don't think it is inconsistent at all with what is going on today.

The principal ground that we resist interention [sic], clearly the grounds on which the 11th Circuit decided it was that they were seven years later filing a motion for intervention. They filed for intervention in 1981. The action was instituted in January of 1974.

They filed, at the hearing on the approval of the Consent Degree [sic] and Judge Pointer decided it was untimely. Had they moved to intervene seven years earlier I don't think our position would be the same.

In any event, we certainly have not waited seven years to move to intervene.

THE COURT: I don't recall the 11th Circuit mentioning the seven years delay.

MR. JOFFEE [sic]: It does, Your Honor.

THE COURT: It does?

MR. JOFFEE [sic]: Yes.

THE COURT: It has been a while since I read it. I just read these things as they come across my desk. Seems like there is about 15 a week.

MR. FITZPATRICK: Your Honor, if I may respond to that.

THE COURT: Wait a minute. Let him finish.

[Page 25]

MR. JOFFEE [sic]: I think the principal ground — in fact, the principal ground Judge Pointer denied intervention on, the 11th Circuit affirmed on, was it was untimely. But there is an additional difference. They were not representing a class and they, of necessity, were pressing their own individual rights which may or may not have been in jeopardy that time.

We are in a somewhat different position. We are signatories to a decree and have contractual rights for relief in the future, which we are seeking to vindicate or protect, really, against any consistent interpretation of the two or a complete emasculation of it.

So we both represent a class and are signatories of the decree. And that puts us in quite a different posture other than they were in that case.

I think the primary difference is that Judge Pointer denied their motion and the 11th Circuit affirmed on the untimeliness ground.

* * *

[Page 30]

THE COURT: Well, I am not, in deciding whether to allow intervention by the beneficiaries of the Consent Decree, I would not be controlled by my understanding of whether the United States, as an intervenor here would adequately represent their interest. What I would be controlled by is whether the City of Birmingham and the Personnel Board who seem to agree with the beneficiaries of the decree, and it has expressed a brief and interpretation, same interpretation, or adequately repre-

sented and will adequately represent that interest. That is what I want to hear from you right now.

MR. JOFFEE [sic]: Your Honor, could I respond to that, because there is a point which we didn't include in our papers which bears on that.

[Page 31]

The 11th Circuit, I think, has said quite clearly, although I only found it this morning, that the City is not an adequate representative for an interest and I would like to bring that point to your attention.

In the situation you referred to earlier where Mr. Fitzpatrick's clients filed a motion to intervene before Judge Pointer, Judge Pointer denied it and it went up to the 11th Circuit. The issue was untimeliness.

Mr. Fitzpatrick argued to the 11th Circuit that the reason for excusing their late motion was that they had believed that the City represented their interests and that the City would defend their position, and it came as quite a surprise when, in the end, the City caved in and signed the Consent Decree. If I may be a little colloquial —

THE COURT: Probably sounds just like Mr. Fitzpatrick.

MR. JOFFEE [sic]: The 11th Circuit said that was insufficient in language, I think, was clear that the City cannot represent, or if I could quote from the 11th Circuit's opinion at 720 Fed 2d 516, 1970. From the beginning the Board and the City represented a wide range of occupations in the public status and

[Page 32]

had different cost benefit settlement interests and incentive from those of the V.F.A. members, those of Mr. Fitzpatrick's clients, thus, the mere fact that the Board and City made a settlement allegedly adverse to the interest of the V.F.A. members does not mean they changed their position and came adverse, as the V.F.A. members alleged in their motion to intervene.

And that same situation existed here, whereas on the surface, the City and we may be taking the same position on cer-

tain of the issues in various courts, our interests are really quite different. They would defend us in the action we originally brought. They are now under an order to comply with the decree. We are the beneficiaries of the decree.

On behalf of our clients we seek the widest possible protection of that decree. They act as [sic] their peril everytime they make a promotion, everytime they hire someone, that someone in going to sue them, either someone in our class, for not getting the benefits of the decree or someone like Mr. Fitzpatrick's clients, that they are getting the wrong end of the decree.

The City has to walk a different line than we and we cannot look to the City to protect our interest.

* * *

[Page 38]

MR. JOFFEE [sic]: There is, if I might just pinpoint this, because it seems to come up continually.

There is a big difference in the 11th Circuit — you had whites who were not facing discrimination with respect to any particular thing that was taking place, and they were concerned that a decree that was being entered, they were not parties to, might adversely affect them in the future.

That is one situation. I believe the reason Mr. Fitzpatrick was denied intervention was because he was seven years late. But at least that was the situation he had, where he had white individuals who could show no right other than that some day in the future they might be discriminated against in violation of the constitution or other laws.

We are in a very different situation. We have a contractual right and a Consent Decree right enforced

[Page 39]

by an injunction for this court, that in the promotion and hiring decisions that are taken over the next six years, we will be treated in a certain way. And one of the cases we cited to you,

Your Honor, in the brief, a third circuit case involving AT&T and the EEOC, it seems to me exactly on point.

The EEOC sued AT&T for discrimination and they entered into a Consent Decree which the Court was about to approve. Along came the union which had it's [sic] own contractual arrangements with AT&T and said, "My goodness, Court, if you entered this decree you are going to impair our contractual rights. We have a right to intervene." AT&T opposed that intervention and the Court allowed it and the third circuit affirmed the intervention.

Here we have a contractual right with one of the parties, the City, which is in danger, and it is actually more than a contract, it is a consent decree and seems to me that is the difference in our situation today, quite apart from the fact that he was seven years late —

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

MEMORANDUM OPINION AND ORDER

The Court has considered briefs and heard oral argument on the following questions:

1. What is the definition and scope of the proposed intervention by the United States of America?

2. Do John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard (Martin, et al.), both in their individual capacities and as representatives of a class established in *Martin v. City of Birmingham*, CV 74-Z-0017-S, have a right to intervene as parties defendant?

3. Do John E. Garvich, Jr., James H. Henson and Robert Bruce Millsap (Garvich, et al.) have a right to intervene as parties plaintiff?

In response to the Court's request and with concurrence of the parties, the United States, by letter of February 10, 1984, copy of which is attached hereto, indicated its intention to intervene on behalf of plaintiffs. At the status conference held on February 28, 1984, the United States reiterated its intention as thus expressed, but the United States has not yet filed any formal pleading. The Court deems the United States now to be an intervenor on behalf of plaintiffs, with the right to participate fully in discovery for the purpose of ultimately ascertaining its

position both with respect to the pertinent factual allegations and the requested relief, and without now vouching for the truth of the plaintiffs' factual averments. Pursuant to 42 U.S.C. §2000(e)5(f)(1), the Court hereby exercises its discretion to allow said intervention by the United States and agrees with the United States that this cause is of such general public importance as to call for full participation by the United States. The Court will not only permit the United States to engage in discovery but hereby exposes it to discovery by the other parties to the extent such discovery may be appropriate. Unless the United States, for good cause, requests an extension, it is hereby required to file a complaint-in-intervention on or before June 15, 1984, stating its position with respect to the factual allegations, the legal conclusions and the relief it deems appropriate.

The Court takes judicial knowledge of the proceedings and prior orders in CV 74-Z-0017-S in this Court wherein Martin, et al., are the representatives of a class and the beneficiaries of a consent decree. From the vigorous defense being offered in the instant cause by defendants City of Birmingham and Personnel Board of Jefferson County, it would seem that the interests of Martin, et al., are being adequately represented without their participation as formal parties. Nevertheless, because of the general public importance of the case, and because of the sincere doubts expressed by Martin, et al., as to the adequacy of the representation of their interests, the Court will allow intervention by Martin, et al., under Rule 24(b), F.R.Civ. P., as *individuals* but not as representatives of a class, that is, unless and until Martin, et al., meet the requirements of Rule 23, F.R.Civ.P., in *this* case. Neither Rule 23 nor Rule 24 contemplates that a class determined to exist in one case can intervene, as such class, in *another* case. If the Court is incorrect in its reading of Rules 23 and 24, the question of whether the intervention should be as individuals or as a class may be academic in light of the fact that the primary purpose for intervention here by Martin, et al., is to assure that their viewpoint will be fairly and fully presented. If Martin, et al., wish the adjudication in this case to be binding upon a class, they must seek class certification as a defendant class under the procedures and requirements of Rule 23. Unfortunately, the

invocation of such procedures runs headlong into the clear requirement of Rule 24(b) that intervention not "unduly delay. . . the rights of the original parties".

The petition of Garvich, et al., to intervene as parties plaintiff meets the requirements of Rule 24(b) and is due to be granted. Henceforward these three new parties shall be desiganted [sic] simply as "plaintiffs" rather than as "intervenors", inasmuch as they are represented by the counsel who represents the original plaintiffs, and all further pleadings shall treat Garvich, et al., as if they had been original plaintiffs.

The pre-trial conference now scheduled for April 12, 1984, is hereby CONTINUED and is re-set on June 1, 1984, at 1:30 P.M., in accordance with the attached pre-trial instructions. All discovery shall be completed on or before June 15, 1984.

DONE this 5th day of March, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-M-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

MOTION OF DEFENDANT-INTERVENORS TO CONSOLIDATE

Defendant-Intervenors ("Intervenors") John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard move this Court pursuant to Fed. R. Civ. P. 42(a) to consolidate for purposes of early resolution of common legal issues, discovery and trial, the cases of *Garner v. City of Birmingham*, Civil Action No. CV82 M 1461S (filed July 1, 1982) ("*Garner*"), *Birmingham Association of City Employees v. Arrington*, Civil Action No. CV82 P 1852S (filed August 30, 1982) ("*B.A.C.E.*"), *Wilks v. Arrington*, Civil Action No. CV83 AR 2166S [sic] (filed September 7, 1983) ("*Wilks*"), and *Zannis v. Arrington*, Civil Action No. CV83 AR 2680S (filed November 7, 1983) ("*Zannis*") with the earliest filed action of *Bennett v. Arrington*, Civil Action No. CV82 P 0850S (filed April 8, 1982) ("*Bennett*"), which is now pending before Chief Judge Sam C. Pointer. As grounds therefor, Intervenors show the Court as follows:

1. The *Bennett*, *Garner*, *B.A.C.E.*, *Wilks* and *Zannis* actions involve numerous central common issues of law and fact:

(a) The earlier filed *Bennett*, *Garner*, and *B.A.C.E.* actions are explicit collateral attacks upon the consent decrees approved by this Court and entered in the consolidated actions of *Martin v. City of Birmingham*, Civil Action No. 74 Z 17S ("*Martin*"), *United States v. Jefferson County*, Civil Action No. 75 P 0666S ("*Jefferson County*") and *Ensley Branch of NAACP v. Seibels*, Civil Action No. 74 Z 12S ("*Ensley Branch*") ("the Consent Decree Cases"). The *Wilks* and *Zannis* Complaints do not mention the consent decrees, but the plaintiffs have stated their view that "the only real issues" in those actions turn on the "consent decrees". Plaintiffs' Brief in Opposition to Motions to Consolidate, *Zannis v. Arrington* (December 2, 1983) at 3.

(b) Plaintiffs in all five actions are white males charging reverse discrimination. Plaintiffs in *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis* are represented by the same counsel.

(c) The City of Birmingham and the *Martin* plaintiffs are defendants in all five actions. Mayor Arrington, the Jefferson County Personnel Board

and its members are defendants in *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis*.

(d) All five Complaints charge that defendants are impermissibly using race and sex to determine employment and promotional opportunity, and thus seek to draw in issue the scope and lawfulness of the race- and sex-conscious relief contemplated by the consent decrees.

(e) All five Complaints charge the defendants with violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis* also aver violations of the Fifth and Fourteenth Amendments to the United States Constitution, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and the Local Fiscal Assistance Act of 1972.

(f) All five Complaints seek an injunction barring the use of race or sex as a criterion in hiring, transfer or promotional decisions.

2. Because of the broad identity of parties and issues in the five cases, consolidation will avoid wasteful and duplicative motion practice, discovery and presentation of evidence and will speed the resolution of all five actions.

3. Consolidation will avoid the risk of conflicting adjudications by different judges of this Court which could impose inconsistent standards of conduct upon the litigants.

4. Consolidation of these related actions is consistent with this Court's prior practice in the Consent Decree Cases. *Martin*, *Ensley Branch* and *Jefferson County* were all filed separately but were consolidated by this Court for purposes of discovery and trial.

5. The *Wilks* and *Zannis* Complaints were filed over a year after the Complaints in *Bennett*, *B.A.C.E.* and *Garner*. Consolidation of those later filed actions with the earlier filed cases before Chief Judge Pointer is therefore appropriate.

WHEREFORE, for the reasons stated above and in the accompanying Memorandum of Law, Intervenors pray that the

court enter an order consolidating *Garner*, *Bennett*, *B.A.C.E.*, *Wilks* and *Zannis*.

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March 15, 1984

[Certificate of Service and memorandum omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et. al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S

ORDER

Defendants-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas and Charles Howard, have filed a motion seeking to have this case consolidated with (1) *Peter J. Zannis, et al. v. Richard Arrington Jr., et al.*, CV 83-AR-2680-S, (2) *James A. Bennett, et al., v. Richard Arrington, Jr., et al.*, CV 82-P-0850-S, (3) *William L. Garner, et al., v. City of Birmingham, et al.*, CV 82-M-1461-S and (4) *Birmingham Association of City Employees, et al., v. Richard Arrington, Jr., et al.*, CV 82-P-1852-S, none of which cases has previously been consolidated with any of the others, although three of the cases have been pending since 1982.

When the judge to whom this case was routinely assigned granted the petition of Martin, et al., for leave to intervene pursuant to Rule 24(b), F.R.Civ.P., he apparently failed to make clear to the intervenors that this case, although potentially involving a consideration or application of a consent decree entered in another case in The United States District Court for the Northern District of Alabama, must stand on its own bottom, and will not be consolidated with other cases by this judge. Intervenors cannot be allowed, in effect, to control the litigation, particularly where the case has already been set for a pretrial conference and where consolidation with several other

cases would be likely to "unduly delay . . . the rights of the original parties", contrary to Rule 24(b).

The motion to consolidate is DENIED. There is, however, no intention to rule on any motion pending in a case not assigned to the undersigned.

DONE this 20th day of March, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*, JOHN W. MARTIN, *et al.*, *Defendants - Intervenors.*	CIVIL ACTION NO. CV 83-AR-2116-S

AMENDED ANSWER OF DEFENDANTS
RICHARD ARRINGTON, JR.
AND THE CITY OF BIRMINGHAM

For answer to the Complaint in Intervention, filed by John E. Garvich, Jr., James W. Henson, and Robert Bruce Millsap, allowed by Order of March 5, 1984, these defendants amend their answer as follows:

1. These defendants adopt by reference the affirmative defenses 1 through 5 of their original answer.

2. These defendants further adopt the Sixth Defense in specific response to Paragraph 1 of the Complaint in Intervention.

3. These defendants deny the allegations of Paragraph 2 of the Complaint in Intervention, except that these defendants admit that they consider race in promotion and employment decisions, to the extent required by the provisions of the Consent Decree heretofore entered in Civil Action Nos. 75-P-0666-S, 74-Z-12-S and 74-Z-17-S.

4. Except as herein expressly admitted the allegations of the Complaint in Intervention are denied.

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander

/s/ Robert K. Spotswood
Robert K. Spotswood

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[Certificate of Service, dated March 26, 1984 omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

PLAINTIFFS' ANSWER OPPOSING DEFENDANT-INTERVENORS' MOTION TO CONSOLIDATE

Plaintiffs in *Wilks*, *Zannis*, *Bennett* and *BACE* hereby oppose the Motion of Defendant-Intervenors to Consolidate. It calls for the consolidation of cases pending before different Judges, and consequently would also require a transfer or reassignment. Because one of these Judges, The Honorable William M. Acker, Jr., has denied the Motion, *see* March 20, 1984 Order, *Wilks v. Arrington*, No. 83-AR-2116-S (N.D.Ala. Sept. 7, 1983) ("*Wilks*"); March 20, 1984 Order, *Zannis v. Arrington*, No. 83-AR-20680-S (N.D.Ala. Oct. 1973) ("*Zannis*"), we respectfully suggest that reassignment and consolidation is inappropriate.

Plaintiffs herein therefore urge Chief Judge Pointer to deny the Motion to Consolidate in the cases before him. Under Rule 42 of the Federal Rules of Civil Procedure ("FRCP"), consolidation is a matter for the discretion of the Judge. Where two Judges are involved, both must agree if their individual discretion is to be preserved.

Morever, Judge Acker's March 20 Orders in *Wilks* and *Zannis* are grounded, in part, on his unwillingness to allow Defendant-Intervenors to control the litigation by upsetting an established pre-trial schedule. Judge Acker feared that consolidation by an intervenor would unduly delay adjudication of the rights of the parties. This is, of course, at odds with the purposes of intervention under FRCP Rule 24, and this specific admonition of Judge Acker to the Defendant-Intervenors. And, finally, Plaintiffs believe that when a claim of illegal racial discrimination is involved, victims should not be buffetted from courtroom to courtroom simply on the basis of projections that long-term judicial economy will result. Given different Judges who are ready, willing and able to accord different victims expeditious individual hearings, they should suffer no delay in adjudication of their rights because related legal questions are presented in other cases within this District.

Plaintiffs believe that Defendant-Intervenors' Motion transgresses the spirit as well as the terms of their intervention

under FRCP 24(b) in *Zannis* and *Wilks*, which provides against participation which will unduly delay the rights of the original parties. Judge Acker granted intervention to movants in *Wilks* with an express warning against procedural devices that would unduly prolong the case. *See Memorandum Opinion and Order* at 2-3 (Mar.6, 1984) (delay in seeking class certification).

Defendant-Intervenors' Motion to Consolidate is especially troubling in view of counsel's representation to the Court at oral argument on their Motion to Intervene:

> THE COURT:
>
> * * *
>
> My question to you is, if I grant your motion to intervene are you going to file a motion to consolidate?
>
> MR. JOFFEE [sic]: I don't think we have crossed that bridge, Your Honor. I would like to make a couple of points.
>
> The motion to consolidate, that was made before Your Honor in both cases, was made to consolidate these cases with the Consent Decree cases, not to consolidate them with BACE and Garner, which are complaints that are virtually identical, word to word, to Zannis and Wilks.
>
> So no motion was made before Your Honor to consolidate those cases with BASE [sic] and Garner, number one.
>
> * * *
>
> The other point is, and this goes, I think, to the point that somehow you are going to have to duplicate anything that has been on before.
>
> It is not our intention to duplicate anything that has been on before . . . .

Transcript of February 28, 1984 hearing at 27-28.

Plaintiffs assert that in the circumstances consolidation may be proscribed by statute as well. Title 28 U.S.C. §137 provides for the division of business among the Judges of the District Court as may be established in rules adopted by agree-

ment of the members of the Court. At bottom, this statute establishes that the principles governing administration of Court affairs are to be made by consensus of the Judges. *See Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100 (10th Cir. 1972) (judge's attempt to reassign cases to himself).

In the *Ritter* case, a random selection process had been established for assignment of cases in the District Court of Utah. The controversy arose when a judge of that court reassigned to himself a case that was pending before a judge who had assumed senior status. The Tenth Circuit held that, under 28 U.S.C. §137, the case should have been reassigned in random fashion unless all the District Court judges could agree on a proper assignment.*

The *Ritter* court stated further that "the independence and integrity of each judge in the district," "public confidence" and "continuity" are protected by the complete agreement needed under 28 U.S.C. §137 and by the supervision of the Circuit Judicial Council under 28 U.S.C. §332. 491 F.2d at 1103.

Plaintiffs believe further that the Motion is an unduly repetitive attack on the District's random selection process for Judges and the principles of comity that make possible the reasonable administration of justice in this Court. The Motion presents the fourth time that consolidation of the legal and factual questions in *Wilks* or *Zannis* with cases before another Judge has been attempted.**

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* While the *Ritter* case involved violation of a rule established by the Tenth Circuit Judicial Council pursuant to 28 U.S.C. §332, the court clearly noted that its ruling did not depend on the fact that the random selection process had been established by rule of the Circuit Council. Under 28 U.S.C. §137, rules prescribed by the district judges would have the same effect. They would prevent any single judge from modifying existing rules of administration without approval of the other judges. *See* 461 F.2d at 1103.

** The most recent attempt prior to the instant motion occurred when Chief Judge Pointer denied Defendant Jefferson County Personnel Board's Motion to Consolidate *Zannis* with *United States v. Jefferson County*, CV-75-P-0666-S ("*Jefferson County*").

In a December 13, 1983 Order, Judge Acker gave a number of reasons why consolidation and transfer are inappropriate. Foremost among them was the need to preserve the process of "random selection" by "luck-of-the-draw" Judge assignments. *See* December 13, 1983 Order at 2, *Wilks*.

Judge Acker ruled that this random process of Judge selection should be preserved despite claims of judicial economy and despite the potential for conflicting opinions by Judges of the same District. He cited specifically the dangers of judge-shopping within this District by criminal defendants seeking to avoid victim restitution.

Defendant-Intervenors' Motion and Memorandum offer no reason to reconsider these decisions. Instead, they reiterate previous arguments to the effect that there are common questions of law and fact involved in all the above-styled cases. In truth, they are using nominally different parties to resubmit the matter of consolidation of various allegedly common legal and factual issues to the Court. Three times is enough. And, as argued previously, the mere presence of some common questions of law or fact is not enough to abrogate the Court's discretion in matters of consolidation.

Finally, Defendant-Intervenors have misconstrued Judge Acker's denial of consolidation in *Zannis* on December 13, 1983. There, Judge Acker articulated his understanding of the principles of comity that govern this Court's administration by advising litigants of his deference to the wishes of the Judge with the lowest-numbered cases in matters otherwise proper for consolidation. *See Zannis* Order at 1 (Dec.13, 1983). With respect to *Zannis* and *Jefferson County*, the latter was lower numbered and before Judge Pointer. Judge Acker indicated that he himself would deny consolidation without prejudice to Judge Pointer's ruling on the same proposed consolidation. By no stretch of the imagination does Judge Acker's view amount to an endorsement of a principle of automatic reassignment to Judges with lower-numbered cases. Judge Acker's Order states a rule of deference.*

---

* Defendant-Intervenors have suggested that the "random selection" principle encourages, rather than discourages, "judge-shopping" because it

For the foregoing reasons, Plaintiffs respectfully request that consolidation be denied.

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

/s/ Albert L. Jordan
ALBERT L. JORDAN
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[Certificate of Service, dated March 28, 1984, omitted]

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encourages litigants to file additional suits in hope of being assigned to a particular judge. *See* Defendant-Intervenors' Memorandum of Law in Support of Motion to Consolidate at 11-12, n.5 (DI Memo). Any suggestion that *Wilks* and *Zannis* were filed in order to obtain a change in the presiding judge is meritless and irresponsible. Separate cases are being filed in compliance with the ruling of the Court of Appeals finding that such individual claims will be heard in this Circuit. *U. S. v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983).

Precisely how "random selection" operates to allow selection of a particular judge is unclear. Even if a party has a multitude of common fact situations that would allow him to plot such a use of the selection process in hopes of obtaining "a judge they like" [DI Memo at 11-12, n.5], a rare occurrence, each filing subjects plaintiffs to only the same chance they will be successful. Such rare occurrence hardly provide a basis for abandonment of the random selection rule. Whatever the merits of a principle of automatic assignment, they are not applicable here.

As a general matter, a rule of "automatic" reassignment to the judge presiding over the lowest-numbered action will not solve the problem. Innumerable judgment questions will arise about when cases are sufficiently related to warrant automatic reassignment, *i.e.*, when, in the discretion of the judge, sufficient common questions exist to warrant proceedings in consolidated fashion. And finally, an automatic reassignment rule is an unnecessary attack on the principles of comity that presently govern this Court, which are more appropriate for resolving problems of this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

ANSWER OF DEFENDANT
UNITED STATES OF AMERICA

In answer to each of the numbered paragraphs of the complaint, defendant United States admits, denies, or otherwise responds as follows:

1. Paragraph 1 of the complaint is admitted.

2. Defendant United States is without information sufficient to admit or deny the allegations contained in paragraph 2 of the complaint.

3. Paragraphs 3, 4, and 5 of the complaint are admitted.

4. Defendant United States admits the names of the members and director of the Jefferson County Personnel Board as of the date of the complaint and admits the remaining allegations of paragraph 6 of the complaint.

5. Paragraph 7 of the complaint is admitted.

6. Defendant United States admits the allegations contained in the first two sentences of paragraph 8 of the complaint but is without knowledge sufficient to admit or deny the remaining allegations of the paragraph.

7. Defendant United States admits the allegations contained in the first two sentences of paragraph 9 of the complaint, but is without knowledge sufficient to admit or deny the allegations contained in the third sentence of the paragraph. Defendant United States admits the allegations contained in the fourth sentence of paragraph 9 of the complaint.

8. Defendant United States admits that Lucious [sic] J. Thomas, Jr. is a black male, but is without knowledge sufficient to admit or deny the remaining allegations of paragraph 10 of the complaint.

9. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraph 11 of the complaint.

10. Defendant United States admits that the Personnel Board knowingly certified the fourth name on the list. Defendant United States admits that the City promoted Lucious [sic] Thomas to the classification of Civil Engineer effective September 4, 1982. Defendant United States is without knowledge sufficient to admit or deny the remaining allegations of paragraph 12 of the complaint.

11. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraphs 13 and 14 of the complaint.

12. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in the first sentence of paragraph 15 of the complaint. Defendant United States denies the remaining allegations contained in paragraph 15.

13. Defendant United States is without knowledge sufficient to admit or deny the allegations contained in paragraphs 16 and 17 of the complaint.

14. Paragraph 18 of the complaint is denied.

15. Defendant United States admits the allegations contained in the first sentence of paragraph 19 of the complaint, but is without knowledge sufficient to admit or deny the remaining allegations of paragraph 19.

16. Paragraph 20 of the complaint is admitted, except that defendant United States denies that the consent decrees referenced in paragraph 20 of the complaint are illegal.

17. Defendant United States denies any allegation of paragraph 21 of the complaint that contests the validity of the consent decrees. Defendant United States is without information or knowledge sufficient to admit or deny the remaining allegations of paragraph 21 of the complaint.

18. Paragraph 22 of the complaint is admitted.

19. Except as stated otherwise herein, defendant United States denies all other allegations of the complaint.

Respectfully submitted,

Wm. Bradford Reynolds
Assistant Attorney General

/s/ Charles J. Cooper
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[Certificate of Service, dated March 29, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S

Motion of Defendant United States for Leave to Amend Motion to Dismiss and to Withdraw Motion for Summary Judgment

Defendant United States moves the Court for leave to withdraw its motion for summary judgment and to amend its motion to dismiss by deleting therefrom paragraphs 1, 2, 3, and 5. Said paragraphs assert (1) that plaintiffs' suit is barred as an "impermissible collateral attack" on the consent decrees entered in *United States* v. *Jefferson County*, C.A. Nos. 75-P-0666-S, 74-P-0017-S, 74-P-0012-S; (2) that plaintiffs' claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et. seq.*, should be dismissed for failure to file discrimination charges with the Equal Employment Opportunity Commission (EEOC); and (3) that plaintiffs' complaint fails to state a cause of action upon which relief may be granted. The United States thus seeks to retain only that portion of its original motion requesting dismissal of plaintiffs' claims under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. § 1221, *et seq.*) and the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. § 3376 *et seq.*) for failure to satisfy the statutory conditions precedent to suit.

As more fully discussed in the attached supporting memorandum, the assertion in the United States' Motion to Dis-

miss or Alternatively for Summary Judgment that the instant suit is barred as an "impermissible collateral attack" on the consent decrees is no longer tenable in light of the Eleventh Circuit's intervening decision in *United States* v. *Jefferson County*, 720 F.2d 1511 (11th Cir. 1982) [sic]. Moreover, there are genuine issues of material fact concerning, *inter alia*, the promotional practices of defendant City of Birmingham and the relative qualifications of promotional candidates. Accordingly, neither a motion to dismiss nor one for summary judgment against the plaintiffs can presently be maintained in light of *Jefferson County*.

Plaintiffs' complaint has been amended to aver that one of the named plaintiffs has filed a charge of discrimination with the EEOC and has received a "Right To Sue" letter. Since all of the other named plaintiffs appear to be similarly situated with the plaintiff who filed the charge, the statutory prerequisites for a Title VII suit have been satisfied.

WHEREFORE, the defendant United States requests leave to withdraw its motion for summary judgment and to amend its motion to dismiss by deleting all but paragraph 4 of the motion.

Respectfully submitted,

WM. BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
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/s/ Michael Carvin
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[Certificate of Service, dated March 29, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs,* v. CITY OF BIRMINGHAM, *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-1852-S

ORDER

Upon consideration of the motion of defendants John W. Martin, Major Florence, Ida McGruder, Sam Coar, Wanda Thomas, Eugene Thomas, and Charles Howard to consolidate, under Fed. R. Civ. P. 42 the above-styled cases with cases CV 33-AR-2166-S [sic] and CV 83-AR-2680-S, currently pending before Judge William A. Acker, it is hereby ORDERED that these five cases be consolidated for pretrial purposes, subject to further order of this court, and that the two cases pending before Judge Acker be reassigned to Judge Sam C. Pointer, Jr. before whom the three earlier-filed cases are pending.

This the 2nd day of April, 1984.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
BIRMINGHAM ASSOCIATION OF CITY EMPLOYEES, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1852-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-AR-2680-S

MOTION FOR CLARIFICATION AND RECONSIDERATION

Plaintiffs in *Wilks*, *Zannis*, *Bennett* and *BACE* move the Judges of this Honorable Court to clarify their respective Orders and the present posture of these cases in the wake of the Motion to Consolidate filed by Defendant-Intervenors Martin, et al., and, if necessary, reconsider the Order granting the Motion to Consolidate by The Honorable Sam C. Pointer, Jr., insofar as *Wilks* and *Zannis* are affected.* In support of this Motion, Plaintiffs show unto the Court as follows:

(1) On March 15, 1984, Defendant-Intervenors filed a Motion to Consolidate in each of five pending cases.

(2) On March 20, 1984, The Honorable William M. Acker, Jr., the randomly-assigned Judge overseeing *Wilks* and *Zannis*, entered Orders denying the proposed consolidation in *Wilks* and *Zannis*. In exercising his discretion in denying the Motion in *Wilks* and *Zannis*, Judge Acker ruled:

> Intervenors cannot be allowed, in effect, to control the litigation, particularly where the case has already been set for a pre-trial conference and where consolidation with several other cases would be likely to "unduly delay . . . the rights of the original parties," contrary to Rule 24(b) [of the Federal Rules of Civil Procedure].

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* Although *Wilks* was nowhere mentioned by name or case number in Judge Pointer's Order, Plaintiffs assume that the reference in the Order to Case "CV-83-AR-2166-S" was a typographical error and should have read "CV-83-AR-2116-S." If not, then this raises an additional need for clarification, especially in view of the care Defendant-Intervenors have taken to distinguish their Motion to Consolidate *Wilks* and *Zannis* with cases before Judge Pointer from previous motions by other Defendants to consolidate. The distinctions were based on the fact that the names of the cases sought to be consolidated were different, and this apparently distinguished the essential questions about consolidation from previously-rejected attempts at consolidation. *See also* Transcript of Oral Argument at 4 (March 30, 1984). Notwithstanding the need for clarification of this possible typographical error, Plaintiffs continue to believe that Defendant-Intervenors' Motion to Consolidate was unduly repetitious of prior motions in *Wilks* and *Zannis*.

Judge Acker further stated: "There is, however, no intention to rule on a motion pending in a case not assigned to [Judge Acker]."

(3) On March 30, 1984, Chief Judge Pointer held a hearing on the same Motion to Consolidate. At the hearing, Judge Pointer announced his intention to grant the Motion in its entirety, reassign the *Wilks* and *Zannis* cases to himself, and consolidate them for pre-trial purposes with *Bennett*, *Garner* and *BACE*. Judge Pointer entered an Order in *Bennett*, *Garner* and *BACE* on April 2, 1984 consistent with his intentions as announced at the March 30 hearing. Judge Pointer did not enter an Order in *Wilks* or *Zannis*. A copy of the transcript of the hearing is attached hereto as Exhibit A.

(4) Judge Pointer's April 2 Order appears to conflict directly with the prior Orders entered by Judge Acker in *Wilks* and *Zannis* on March 20, 1984. While Judge Acker ruled that *Wilks* and *Zannis* were not due to be consolidated with *Bennett*, *Garner* and *BACE*, Judge Pointer has ruled in the cases assigned to him that such a consolidation of Judge Acker's cases should be effected.

(5) At the March 30 hearing on the Motion to Consolidate, Plaintiffs and the United States took the position that a consensus or agreement to reassign the cases or consolidate between both Judges is required in order to grant the proposed consolidation. Transcript at p. 5, lines 7-19; p. 7, line 23; and p. 8, lines 1-2. Judge Pointer advised the parties that he did not believe the Judges were in disagreement on the matter:

"Judge Acker and I are not in disagreement." Tr. at 5, line 20.

> "I have talked with him . . . He [J. Acker] has no objection to my reassigning them and consolidating them if I want to."

Tr. at 8, lines 3-7.

(6) On March 31, 1984, the *Birmingham Post-Herald* reported that Judge Pointer had consolidated the cases pursuant to an agreement with Judge Acker:

> Pointer said yesterday that he and Aker [sic] had discussed the suits after Aker's [sic] ruling and agreed they should be consolidated, at least for the pre-trial proceedings. Pointer said it was determined that he would take them, in part because the first challenge was assigned to him.

Birmingham Post-Herald, March 31, 1984, p. A9 (copy attached as Exhibit B).

(8) On April 2, 1984, Judge Acker wrote a letter to all counsel of record in *Wilks* and *Zannis* advising that Judge Pointer claimed the newspaper report of a consensus is in error and there might be a misunderstanding between Judge Pointer and himself as to the substance of their agreement. A copy of such letter is attached hereto as Exhibit C. Judge Acker's letter states that he and Judge Pointer agreed on certain protocol in this Court, and that his "rulings in these cases [*Wilks* and *Zannis*] speak for themselves." The letter further states Judge Acker's understanding of the "protocol" of the Court that "gives each judge the right to rule on any motion pending in a case assigned to him, including a motion to consolidate . . . ." In addition, Judge Acker states, under Court protocol, that "*if* cases are consolidated they shall *thereafter* proceed as to the consolidated matters before the judge who has the oldest of the consolidated cases." (Emphasis added.)

Judge Acker nowhere said that he and Judge Pointer agree on whether their common understanding of protocol resolves the issue of consolidation. Moreover, his letter suggests that press statements of a joint Pointer-Acker decision to consolidate are inconsistent with the Acker rulings in *Wilks* and *Zannis*.

(9) Judge Acker's letter, despite its efforts at avoiding misunderstanding, has left Plaintiffs confused as to the Judge who will hear their cases and which Orders control. The letter suggests that there is no consensus or understanding between the Judges sufficient to allow Plaintiffs' cases to be reassigned to another Judge, and that, under Court protocol, Judge Acker had the right, as the randomly-assigned Judge, to rule on the motion to consolidate insofar as *Wilks* and *Zannis* were concerned.

While Judge Acker did not rule as to a consolidation of the three cases not before him, he unequivocally ruled on March 20 that *Wilks* and *Zannis* were not to be consolidated with any other case. Judge Acker's letter of April 2 reaffirms his prior Orders.

Judge Pointer, nonetheless, has entered an Order in the cases pending before him that is in direct conflict with the prior Orders of Judge Acker. The effect of Judge Pointer's April 2 Order may be to overrule Judge Acker's March 20 Orders in his cases.

Notwithstanding Judge Acker's statement that his "rulings speak for themselves," some clarification is needed from the Judges for the benefit of the Court, as well as counsel. Also, given Plaintiffs' fears that consolidation will delay adjudication of their rights, and prior Orders in their cases stating that consolidation would have that effect, the Judges should resolve the ambiguities arising from Judge Acker's letter and Judge Pointer's statements at the hearing on the Motion to Consolidate.

(10) Plaintiffs believe that Judge Acker's March 20 Orders are the law of the case as to *Wilks* and *Zannis*. Only if Judge Acker agrees to a modification of his prior Orders may his right to exercise his discretion in his cases be preserved in accord with the protocol of the Court vesting in each Judge the right to control the litigation randomly assigned to him under the rules governing the operation of the Court. Reasonable doubt and substantial question have been raised with respect to whether Judge Pointer has misunderstood Judge Acker's position as to the overruling of Judge Acker's prior Orders.

Therefore, Plaintiffs respectfully request the Honorable Judges to clarify their March 20, 1984 and April 2, 1984 Orders so as to reflect their agreement as to reassignment and consolidation. Without a clarification, Plaintiffs are faced with irreconcilably conflicting Orders from United States District Judges of equal authority.

(11) In the event a clear agreement and consensus on reassignment and consolidation may not be reached, Plaintiffs respectfully request reconsideration of Judge Pointer's April 2 Order. In addition to the reasons set forth in Plaintiffs' Answer

Opposing Defendant-Intervenors' Motion to Consolidate, Plaintiffs suggest that the April 2 Order, insofar as it affects *Wilks* and *Zannis*, impermissibly undermines the independent decision-making authority of a randomly-assigned Federal Judge in contravention of statute and the structure of the Constitution. *See* 28 U.S.C. §137; *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970) ("There can, of course, be no disagreement among us to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function."); *id.*, at 141-43 (Black, J., dissenting); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972) (Chief Judge's attempt to reassign cases to himself); *United States v. Heath*, 103 F.Supp. 1, 2 (D. Hawaii 1952) ("No express or implied power is granted chief judge to affect administratively, directly or indirectly, litigation assigned to and pending before another judge of district court.")

Reassignment is improper when the reassigning judge unilaterally designates himself to hear the case. *See Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 504-05 (1933). Construing the predecessor to 28 U.S. §137, which gave the Senior Circuit Judge power to divide business and assign cases to the District Courts over which he presided,* the U.S. Supreme Court criticized a Senior Circuit Judge who had assigned himself to sit in a particular case in a District Court involving appointment of receivers:

> All this shows that the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed on careful consideration and with the utmost impartiality. The difference of opinion, between the Senior Circuit Judge and the District Judges . . . was not a proper

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* That statute was codified at 28 U.S.C. §27 and reads as follows:

> In districts having more than one district judge, the judges may agree on the division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit shall make all necessary orders for the division of business and the assignment of cases for trial in said District; . . . .

> ground for taking the case away from the District Judge before whom it would ordinarily come, and bringing it before the assigning Senior Circuit Judge . . . . Had he reflected he probably would not have made such an assignment; but he acted hastily and evidently with questionable wisdom.

Id., at 505 (footnote omitted).

The Court indicated that the Circuit Judge's withdrawal would be the proper course:

> This action has embarassed [sic] and is embarassing [sic] the receivership. If he were now to withdraw from further participation in the receivership proceedings, the embarassment [sic] would be relieved; and the belief is ventured here, that on further reflection, he will recognize the propriety of so doing and, by withdrawing, will open the way for another judge with appropriate authority to conduct the further proceedings.
>
> *Id.*

In *Manhattan Railway*, the District Court had provided for assignment of cases seeking receiverships, and had a practice of appointment a trust company as receiver. A prospective plaintiff in such a suit, a transportation company, thought a trust company would not be adequate to manage its affairs. Through counsel, the Senior Circuit Judge was informed of this and agreed. Thereafter, the Circuit Judge designated himself as a District Judge pursuant to 28 U.S.C. §22, and then objected to the existing practice of that court for assignment of cases. Pursuant to his authority in 28 U.S.C. §27, he then assigned himself to the case.

The Supreme Court held that a subsequently-filed private suit, to which the judge was not a party, and which attacked the receiver appointed for the company, was not a proper vehicle to attack the judge's action. Then, the Supreme Court proceeded to add the above-quoted passages.

The next revision of the Judicial Code in 1948 removed the possibility of such a case occurring again. Congress revised

the provision, which became 28 U.S.C. §137, to provide for action by agreement to the extent possible. The new section omitted the power of a single judge to abrogate existing agreed procedures and claim the right to hear a particular case by virtue of residual authority to divide the court's business. *See Ritter*, 461 F.2d at 1103 ("[I]t is unquestioned that the division of the court's business is the responsibility of the judges and not the responsibility of the chief judge acting unilaterally.")

In this case, it is clear that the agreed method for assignment of cases in this District is the use of a random judge-selection process. No one has questioned this. *See Wilks*, Order at 2 (Dec. 13, 1983). *If* the case is proper for consolidation with other cases, *then* it is also agreed that the case is due to be handled by the judge with the first-filed case.

While one particular Judge, the Chief Judge, retains some residual power to assign cases in a manner consistent with the agreed rules, this power does not confer on him the unilateral power to determine that cases before different judges are proper for consolidation. The assignment of cases and their consolidation are distinctly different actions. *See Martinez v. United States*, 686 F.2d 334 (5th Cir. 1983); *United States v. Stone*, 411 F.2d 597 (5th Cir. 1972). Moreover, consolidation concerns the application of Article III power in evaluating the kinds of issues involved in separate cases and the effect on litigants of joining those issues for resolution. It would be inconsistent with the independence of the Federal judgeship to allow the Chief Judge of the District Court to overrule a randomly-assigned District Judge's evaluation of the propriety of consolidation of a particular case with others. *See, e.g., Ritter*, 461 F.2d at 1103; *Stone*, 411 F.2d at 498 ("Each judge of a multi-district court has the same power and authority as each other judge."); *United States v. Phillips*, 577 F.Supp. 879, 880 (N.D. Ill. 1984).

This is especially true here where Judge Acker deemed consolidation ill-advised because it would unduly delay adjudication of the rights of the parties in the cases before him. Judge Acker has already set the cases for a pre-trial conference and established a date for trial. His willingness to provide such expeditious consideration of the civil rights claims involved

should be respected. Plaintiffs should not be required to suffer the delay in adjudication that will inevitably accompany joining this suit with others. Whatever over-all economies that may accure [sic] to this Court from consolidation, Plaintiffs' right to a prompt hearing before a willing, randomly-assigned judge, counsels against reassignment of the cases before Judge Pointer.*

Nothing in Rule 42 purports to give a single judge in a multi-judge court the unilateral power to order consolidation of actions pending before another judge. All actions taken under its authority are actions by "the Court." Judge Acker's March 20 Orders make appropriate recognition of this insofar as they do not purport to rule on the motion to consolidate the cases pending before Judge Pointer. Any other ruling would have been inconsistent with the well-accepted notion that consolidation is a matter of discretion. In sum, the Court's power to consolidate actions before different judges confers no authority on an individual district judge to overturn another district judge's discretion against consolidation.

It begs the question to argue that *Wilks* and *Zannis* should have been assigned to Judge Pointer in the first place. While the cover sheets of this Court provide for indication from plaintiff's counsel of related actions, there had been no ruling by agreement of the Judges that any actions potentially related to *Bennett*. *Garner* and *BACE* were due to be assigned to Judge Pointer for ruling on consolidation. As such, the random selection rule should continue to operate, and do so, notwithstanding any lawyer's suggestion that cases are related and might be candidates for consolidation. Only *after* random assignment has occurred is the issue of consolidation to be resolved.**

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* The prospect of inconsistent rulings from the separate Judges is a possible problem, but not one that compels reassignment and consolidation. Differing rulings by Judges of the same District Court can be resolved by the appellate process if necessary. *See Wilks*, Order at 3 (Dec. 13, 1983); *IB Moore's Fed. Prac.* §0.402[1].

** Indeed, providing for automatic reassignment for ruling on consolidation may be improper. *Cf.*, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258-59 (1957) (mandamus proper to stop regular reassignment of cases to masters).

That issue cannot be resolved without Judge Acker's acquiescence. In the words of Judge Jones of the Fifth Circuit: "'When a cause is pending before a particular Judge of . . . a [District Court], such Judge for the time being has exclusive jurisdiction thereover . . . .'" *In re Brown*, 346 F.2d 903, 910-11 (5th Cir. 1965) (Jones, J., concurring), quoting *Buhler v. Pescor*, 63 F.Supp. 632, 639 (W.D. Mo. 1945), and citing *United States v. Heath*, *supra*.

Given Judge Acker's prior Orders and letter, it is imperative that Judges Acker and Pointer agree explicitly to reassignment and consolidation of *Wilks* and *Zannis* before Judge Pointer *or* that they acknowledge their Orders conflict, and therefore each case is due to proceed separately before the randomly-selected Judge.

In light of Judge Acker's letter, Plaintiffs believe they are faced with irreconcilably conflicting Orders on the same matter. Plaintiffs request that Judge Pointer and Judge Acker (1) clarify their respective prior Orders to reflect a consensus on the issue of reassignment and consolidation, and (2) if such a consensus is not present, then Plaintiffs request reconsideration of the April 2 Order.

Respectfully submitted,

/s/ Raymond P. Fitzpatrick, Jr.
RAYMOND P. FITZPATRICK, JR.

/s/ Albert L. Jordan
ALBERT L. JORDAN

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[Certificate of Service, dated April 5, 1984, and exhibits omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

ORDER

1. The motion of the plaintiffs in CV 82-P-0850-S, CV 82-P-1852-S, CV 83-P-2116-S, and CV 83-P-2680-S, filed April 5, 1984, is, upon consideration, GRANTED to the extent that the order dated April 2, 1984, is amended so that the reference to "CV 83-AR-2166-S" reads "CV 83-AR-2116-S." In all other respects, the motion is DENIED.

2. Pursuant to Fed. R. Civ. P. 42, the case of Johnny Howard v. City of Birmingham, et al., CV 83-P-3010-S, is hereby consolidated for pretrial purposes, subject to further order of this court, with CV 82-P-0850-S, CV 82-P-1461-S, CV 82-P-1852-S, CV 83-P-2116-S, and CV 83-P-2680-S.

3. A master case file for these consolidated cases is hereby established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV 84-P-0903-S. All pleadings, motions, discovery requests, discovery responses, and orders hereafter filed in these cases shall be filed in the master file and need not also be filed in individual case files unless they pertain uniquely to a particular case.

4. A pretrial conference will be held at 9 a.m. Monday, May 14, 1984, in the chambers of the undersigned for the purposes specified in Fed. R. Civ. P. 16 and 26(f). Counsel shall confer in advance of the conference and attempt to develop a mutually acceptable plan for conducting further discovery in this litigation. Subject to further order of the court, Raymond Fitzpatrick shall act as lead counsel for the plaintiffs in this

litigation and James Alexander shall act as lead counsel for the defendants in this litigation.

5. A copy of this order shall be filed in each of the constituent cases.

This the 12th day of April, 1984.

/s/ Sam C. Pointer, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-0850-S
WILLIAM L. GARNER, *et al.*, *Plaintiffs*, v. CITY OF BIRMINGHAM, *et al.*, *Defendants*.	CIVIL ACTION NO. CV 82-P-1461-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S
PETER J. ZANNIS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2680-S

MOTION OF DEFENDANT-INTERVENORS TO DISMISS AND FOR ALLOWANCE OF COSTS

Defendant-Intervenors John W. Martin, *et al.*, move to dismiss the Complaints in each of these consolidated actions on the following grounds:

1. Each of these actions is an impermissible attempt to reopen another case, relitigate the merits and destroy the validity of the judgment between the original parties.

2. Each of the complaints fails to state a claim upon which relief can be granted in that the only actions averred constitute lawful measures to remedy the effects of past discrimination and do not violate any legal rights of plaintiffs.

Defendant-intervenors ask that plaintiffs be ordered to pay defendant-intervenors their reasonable costs, including attorney fees, for their defense of each of these actions, upon the ground that plaintiffs' suits are frivolous and vexatious.

A memorandum of law in support of this motion is attached.

April 14, 1984.

Respectfully submitted,

/s/ Robert D. Joffe

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANTS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM TO DISMISS

Defendants Richard Arrington, Jr. and the City of Birmingham move to dismiss the complaints in *Bennett v. Arrington*, No. CV-82-P-0850-S, *Garner v. City of Birmingham*, No. CV-82-P-1461-S, *Wilks v. Arrington*, No. CV-83-P-2116-S, and *Zannis v. Arrington*, No. CV-83-P-2680-S, on the following grounds:

1. Each of these actions is an impermissible attempt to reopen another case, relitigate merits issues resolved or settled, and destroy the validity of the judgment between the original parties to the Consent Decree, entered on August 18, 1981.

2. Each of the complaints fails to state a claim upon which relief can be granted in that the only conduct averred therein involving these defendants consists of lawful measures required or permitted by the Consent Decree with the City of Birmingham, entered in No. 75-P-0666-S, No. 74-Z-17-S and No. 74-Z-12-S, which did not violate any legal rights of the plaintiffs.

3. These defendants adopt the arguments of the *Martin* defendant-intervenors previously submitted in support of their Motion to Dismiss these cases.

Respectfully submitted,

/s/ James K. Baker
James K. Baker

/s/ James P. Alexander
James P. Alexander
Robert K. Spotswood

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and the City of Birmingham

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[Certificate of Service, dated April 25, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

CAPTION

Oral argument on motions coming on to be heard before the Honorable Sam C. Pointer, Jr., presiding judge, on the 14th day of May, 1984, at the United States District Courthouse, Birmingham, Alabama, beginning at 9:00 a.m.

APPEARANCES

Charles Cooper and William R. Wortham
Susan Reeves
David Whiteside and Mike Hall
James K. Baker, City Attorney
James T. Alexander
Steven Spitz and Robert D. Joffe
Robert Wiggins
Raymond F. Fitzpatrick
and others

Mayra B. Malone, RPR, CP, CM
Federal Official Reporter

[Page 2]

PROCEEDINGS

THE COURT: I ask counsel to please identify yourselves by name during the course of these proceedings. I ask this in view of the fact that there are a number of counsel that are not that familiar with myself or the court reporter. Has a proposed agenda been prepared by Mr. Fitzpatrick and Mr. Alexander?

MR. ALEXANDER: No, your honor, Mr. Fitzpatrick and I met on Friday with the thought of discussing the — pardon me. Jim Alexander. The thought of discussing the discovery plan. We concluded that while we each had some idea of what we wanted to do in that regard, that the court's ruling on the pending motions to dismiss would certain [sic] impact or perhaps shape the discovery that we had in mind and once that is disposed of, we would perhaps move on.

THE COURT: I will go ahead and directly and immediately address the pending motions to dismiss and for summary judgment filed in several of these cases. There is a lot of paperwork that has been filed with the court. I have read the briefs. I do not expect, desire nor will I permit oral argument other than that which may be needed to supplement matters that were not covered in the briefs.

Is there any additional matter that the movants

[Page 3]

have?

MR. JOFFE: Yes, your honor. Robert Joffe for the movants. I have a couple points we didn't make in our brief I would like to make.

First, on the issue of computation, one point we didn't make in the brief but which I would like to call the court's attention to is paragraph three of the Decree which makes it clear that the Decree makes a distinction between actions which are required and actions which are permitted. The language of the City Decree clearly doesn't support the government's position. Paragraph three expressly recognizes two classes of remedial actions and practices designed to achieve compliance with the Decree; those required by the terms of the Decree and those permitted to actuate and carry out the purpose of the Decree, and that is a point we make.

Another point I would like to make on the interpretation which we didn't make is the Personnel Board's Decree would be meaningless if the certifications that they are required to perform to people who were certified as qualified in the list of blacks and women, if they could not be hired even though they

were less qualified than their white counterparts, as long as they were qualified. You would

[Page 4]

have the situation where the Personnel Board was certifying long lists of people who then could not be hired. There would be no point in having the Board do that, which I guess is just another reason why —

THE COURT: Depending upon the interpretation of [the] phrase, "demonstrably less qualified."

MR. JOFFE: Yes, unless the City were permitted though to hire people who were demonstrably less qualified. As long as qualified, there would be no point in asking the Personnel Board to certify people in any order but in the order in which they are most qualified if the City didn't have the power to hire them.

Second, or on a different point than the interpretation, we have made a motion to dismiss. That is, our argument is that the allegations in the complaint, complaints, are not sufficient to even if true in any way impune [sic] the Decree. And I think that is correct, but I would like to make the — like to point out that the City has also moved for summary judgment and that means that the burden then is on the plaintiff to come forth and state those facts which if true would have impuned [sic] the Decree and none of the papers that have been put in by either the government or the plaintiffs have any additional facts been put in

[Page 5]

which if true would in any way cast doubt on the Decree. Your honor, of course, under 12 be allowed to treat the motion for summary judgment any way and the City has made such a motion and the facts have been put forth.

I should note that under the Williams case that if the private plaintiffs here had been allowed into the original Decree proceeding, the only thing that the Williams court would have allowed them to present evidence as to would have been the reasonableness of the Decrees as to themselves. It would not

have allowed them to try the whole discrimination issue, and I note the government in its papers takes the same position that even if they were allowed now to attack the Decree, they could not retry the discrimination, so the only issue which the private plaintiffs could have presented evidence on, had they been allowed into the Decree proceeding, would have been the reasonableness of the Decree as for themselves; that they have not even here alleged facts as to the unreasonability other than their per se attack on the quotas which clearly as a matter of law is insufficient. So I think again their complaints fail. If your honor were to find somehow that they have raised a factual issue, it seems to me that the only possible factual issue that they would be

[Page 6]

allowed to present evidence on would be the reasonableness of the Decree, as to themselves, and if your honor were to go in that direction, I would suggest that these proceedings then be consolidated with the Consent Decree proceeding but I think we have set forth in our papers why we feel that is not sufficient, it is not necessary.

And finally I would like to turn to two points. I would like to turn to the Miami-Kirkland point for a minute. In the City of Miami case, a collective bargaining agreement was involved. That is a very different situation here. The court relied there on the fact that these rights, the non-parties to the Decree were complaining, had been interfered with contractual rights with the City which the City itself had given them and bound themselves not to take away. That is not the case here. Here at best the rights are Alabama statutory rights and it seems to me that it is clearly that a consent decree is going to affect third parties in a variety of different ways and it is up to the federal court to decide as a matter of federal law which of those rights are so substantial they can't be interfered with and which of those rights can be interfered with in light of the paramount federal policy in the supremacy clause. The Kirkland court was faced with almost

[Page 7]

an identical situation and there the Second Circuit held that these kind of state statutory rights which were not inbodied [sic] in a collective bargaining agreement were not so strong that they couldn't be set aside by reasonable consent decree.

It seems to me that the very same arguments that are being made today were made to your honor at the fairness hearings and in fact the Fifth Circuit there had already granted rehearing in the Miami case and in your comments that you seem to recognize that that case was going to go off on the ground of a collective bargaining agreement.

The last issue I would like to turn to is the claim that, well, while we may not have an injunctive claim, the plaintiffs say we at least have a claim for damages, for pay. It seems to me the first point one must remember there is that for that claim to succeed, you still must show that the Decree is unreasonable. That is the foundation point, that the Decree goes too far, is in some way invalid. Nothing has been said in the pleadings here which suggests that the Decree is in any way invalid other than it takes race and sex into account. In other words, it is a per se attack and I think they would show

[Page 8]

it was insufficient. So I think the fundamental point is in myth.

The second point however though is that a claim for damages would completely undermine the relief here. The City would be, I think in the words of Justice Blackmon [sic] in his concurring opinion in the [Weber] case, on a high tightrope without a net beneath. Every time they made a decision they would be forced between complying with the Consent Decree and paying damages. It would be a very hard decision for the City to make. They would be faced with suits each time they made it, and the whole purpose of the Decree would be gutted.

In the Almarr Paper Company case the Supreme Court recognized the current effect of the suit was for damages. Of course, there was a case involving a suit by the minority but the court placed very much emphasis on the suit for damages that that would create. It seems to me that to allow such a deterrent

effect that would run concurrent to the Decree would cause a real undermining of the Decree.

Finally I would like to call the court's attention to a decision of May 3rd, 1984, by a district court in New Jersey, Judge Sarokin. Vulcan Pioneers, Inc., versus

[Page 9]

New Jersey Department of Civil Service. The United States was a co-plaintiff in that case. In that case, firemen had to be laid off in their collective bargaining agreement and the issue was whether the seniority system should be adhered to even if that meant gutting the Consent Decree that was in effect. Judge Sarokin said, yes, even though it was a collective bargaining agreement, that they should be laid— that they should be laid off and the seniority rights would fall. He said that the notion that the municipal government must compensate was absurd was the word he used for the reasons I said, but he went on to say if there was to be compensation the federal government should pay for it. After all, it is Title VII here that has caused this. It is a federal policy which is setting aside state contract rights. The United States government is one of the plaintiffs in the case and if anyone is responsible for compensating these people, it is the federal government. Thank you.

THE COURT: Anything other from the movants to supplement this?

(No response.)

THE COURT: Plaintiffs?

MR. FITZPATRICK: My name is Raymond Fitzpatrick

[Page 10]

representing the private plaintiffs. First of all, the movants simply failed to adequately address the Jefferson County opinion and without regurgitating to the court what is in our brief, the Jefferson County opinion does expressly reject the impermissible collateral attack doctrine on which the movants rely and rejects the cases on which the movants rely. The movants have alleged and asked this court to dismiss the cases

on the simple allegations of the movants that all of the challenged actions are mandated by the Consent Decree. Under that allegation alone they claim the court should dismiss these cases. That is wrong for two reasons. First, the cases allege actions which are not mandated by a lawful Decree. They allege that less qualified persons were promoted solely on the basis of race. Paragraph two says the Decree does not require the promotion on the basis of race. If it does not require it, it does not mandate it. The second reason is even if all of the defendant's actions are required by the Decree, that fact alone is not a shield to liability. The Jefferson County opinion stands for the proposition that the entry of the Consent Decree which may or may not affect third parties is of no conclusive effect to the rights of those third parties and for that reason it does not set the

[Page 11]

standard of conduct as to the parties to the Decree toward the — toward parties who did not consent to that standard of conduct.

We are complaining of practices, not violations of the Decree, which practices which are discriminatory and illegal toward the plaintiffs.

The Jefferson County opinion provides that individuals claiming what they call "reverse discrimination" are entitled to file individual suits.

THE COURT: I believe that this is regurgitation.

MR. FITZPATRICK: Okay. I will go to their supremacy clause now, if I may. They claim that the supremacy clause permits them by entry of a Consent Decree to invalidate enforceable rights of non-parties. The cases that they cite either involved litigated findings of discrimination or employees who did not have enforceable rights, and Arthur versus Nikas was a litigated finding. U. S. versus Chicago was a litigated case. Carter versus Gallagher was litigated. The Boston NAACP versus Beecher was litigated on the liability issue and the court expressly found that what was at issue was the power of the court in a litigated discrimination case to protect the relief that had already been achieved. The consent

[Page 12]

decree in Beecher was only as to the remedy and not as to the issue of liability. In Kirkland which Mr. — which the movants rely on, the collective bargaining agreement presented in that case expressly provided that the power to alter the promotional procedures was retained by the employer. Kirkland distinguished from City of Miami where the employer did not have that power. Here the employer does not have the power to alter the enforceable rights of the plaintiffs because the City of Birmingham and the Jefferson County Personnel Board are entities of limited authorities and the rights of the employees stem not from something that is granted by the municipality but something granted by the legislature.

The Miami case involved more than a collective bargaining agreement. First of all, the Miami case provides that the rights of the employees stem from Florida statutes which grant rights to the City of Miami and the civil service ordinance. The collective bargaining agreement simply provides that the prevailing laws in effect as the — on the date that the collective bargaining agreement is signed are not to be changed without the union's concurrence, but the rights of the employees stem not from the collective bargaining agreement but from the ordinance. Here the rights

[Page 13]

of the employees stem from a statute which in the same case — the defendants in this case do not have the power to alter. Arrington versus Associated General Contractors case affirms that. Finally the discrimination alleged is presumably litigious. We deal with that at roman numeral two in our brief, and the court, we submit, should consider our claims carefully after a full trial. Thank you, your honor.

THE COURT: United States is movant, opponent or partial movant.

MR. COOPER: Plaintiff, defendant. Thank you, your honor, Charles Cooper for the United States. We have a motion pending with the court to amend our motion to dismiss which we did not answer oral argument on I don't intend to

regurgitate anything in those papers. I would like briefly to respond to some of the points made earlier by counsel for the defendant intervenors and then make a couple of points that appeared now in their most recent filing last Friday.

First, with respect to interpretation of paragraph three of the Consent Decree, counsel is precisely correct it does make a distinction between those remedial actions required by the terms of the Decree. Just as paragraph

[Page 14]

two of the Decree makes that distinction and it goes on to say "or permitted." Permitted not, however, by the terms of the Decree, permitted — In fact, the only word that is modified, by the terms of the Decree, is the word "required." Or the question is permitted by what? Permitted by law outside the confines of the four corners of the Decree with respect to — so there is nothing at all inconsistent with that clause of the Consent Decree and the interpretation the United States has pressed. With respect to the distinction between a document, a decree that does not forbid conduct which this one clearly does not forbid the state, the city either from promoting lesser qualified blacks over better qualified whites or from promoting entirely unqualified blacks. Incidentally, your honor, on a point raised on Friday, the filings of Friday, there is nothing in these decrees that forbids the state, the city from promoting an unqualified black, an entirely unqualified black. Nothing in these decrees. The City cites languages. It says subject to the availability of qualified candidates or applicants. That is no more or no less than what is already provided in paragraph two. They need not meet their goal if there isn't — if there isn't a qualified candidate, just as paragraph two says. They need not

[Page 15]

promote an unqualified candidate. Paragraph two also says they need not promote a lesser qualified candidate.

Counsel suggests that the Personnel Board Decree becomes somehow meaningless under the United States' interpretation in this regard because it requires certifications without apparently respect to the qualifications of blacks or whites or

whether or not the black is qualified. The point, your honor, is that when these — when the Personnel Board Decree was entered, the system of certification was based entirely on test scores virtually and these tests were under a dark cloud at the time the Decree was entered. There was substantial foundation for believing that the test scores did not distinguish in a relative sense between qualifications and as long as the test scores were the only means by which individuals certified to the City, it was perfectly possible and indeed it was worded such that they had a profound disparate effect on blacks, so the simple requirement is that if you have — is to not hold the test scores in terms of relative qualifications but rather certify your best qualified as it were black candidate or female candidate and allow the City to determine based on competition superior qualifications as state law requires, who they will select. There is nothing inconsistent with

[Page 16]

the Personnel Board Decree. On the Miami-Kirkland point, counsel suggests that in Kirkland, the Court of Appeals for the Second Circuit said that state statutory rights are not so substantial that they can't be set aside by Consent Decree. In fact, your honor, the Court of Appeals for the Second Circuit said that the plaintiffs there had no state statutory rights that were in conflict with the consent decree. It distinguished City of Miami on that precise question. In the City of Miami, there was a municipal ordinance that accorded a right to promotional standing or place in the test takers in that contest. The only reason that the City of Miami couldn't exercise its otherwise broad power to change the system for promotions was that a collective bargaining unit agreement prohibited them from changing it. In Kirkland, there was no contractual provision that prohibited the New Jersey state civil service commission from — and these are the words of the court — "exercising its wide discretion to choose and modify the procedures it sees fit to determine merit and fitness." There was nothing in the consent decree, in the collective bargaining agreement there, that in any way interfered with the commission's ability to do that and therefore entering into an inconsistent consent decree or a consent

[Page 17]

decree under which they changed the qualifications for merit and fitness was in no way contrary to contractual rights.

Counsel also suggests that City of Miami and the Saveway Stores, W.R. Grace, that entire line of cases is limited to the context of the collective bargaining agreement. It is true that in each of those cases there was a collective bargaining agreement but the doctrine of those cases, we submit, your honor, is in no way limited to collective rights but it applies to any legally enforceable right and the language of those cases makes this clear. In Saveway Stores, page 579, if EEOC seeks a remedy which would infringe upon the rights of a third party on the rights, your honor, not collective bargaining rights, it cannot rely on its agreement with another party to do so. And another place in the opinion, if the EEOC — excuse me — enforcement of these agreements is not permissible as to those who have not consented to their provisions and who are prejudiced by their terms. Prejudiced, your honor, now the same is true of the City of Miami case. Where the enbanc [sic] court said, "A party potentially prejudiced by a decree has a right to judicial determination of the merits of its objection." These excerpts, your honor, would

[Page 18]

suggest a doctrine. Perhaps I [sic] don't understand what I am suggesting to you. I am suggesting to you there is no reason to distinguish between collective bargaining agreement rights and those rights that are legal enforceable but come from some other source. Here is state law, but even if contractual rights are somehow magic in this area, the State of Alabama, as we read the opinion, has interpreted the enabling rights and acts it envisions in public employees in the state who have no collective bargaining abilities as contractual rights.

With respect to Judge Sarokin's decision very recently, your honor, I merely ask that you read it and the answers will be self evident.

On the supremacy clause argument, counsel, I think, confuses the distinction between what it is that is required before

you have a validly entered and duly entered consent decree on the one hand and the fact on the other hand that that validly entered consent decree is entitled to the full of the supremacy clause protection but you have got first to decide the threshhold [sic] issue. And once it has been determined that the consent decree is valid and that the objections of the objectors are meritless or that the consent of those who have to consent has been obtained or

[Page 19]

that provisions that are not consented to have been purged of the decree, then, yes, the decree is entitled to supremacy clause protection. But the point we are making, your honor, is before it is entitled to supremacy clause protection, these cases, W.R. Grace line of cases, City of Miami, Saveway Stores, has to first be complied with then the supremacy clause attaches and — excuse me — inconsistent state law falls away. There is no case inconsistent with that proposition.

Finally, your honor, I am bound to make a couple of points in response to the rather rough language and harsh allegations made in the defendant-intervenors' filing Friday last. Allegations concern the United States' interpretation of these decrees and perhaps the United States' alleged lack of fidelity to previous interpretations —

THE COURT: I believe we can deal with that more adequately as I move to the question of at least a discussion on procedures dealing with the consent order, a motion that was filed in the other case.

MR. COOPER: Certainly, your honor, I am happy to deal with it at that time if your honor is saying we are going to deal with that today because I think —

[Page 20]

THE COURT: I am suggesting that I not deal with it right at this moment.

MR. COOPER: Your honor, may I not beg your indulgence to hear me out on a couple of points? These are most troubling.

THE COURT: Mr. Cooper, I am prepared to make a ruling on the motion for summary judgment and to dismiss. I would like to go ahead now and make that ruling.

I am going to deny the motion for summary judgment and to dismiss. In my view, there is a genuine issue of fact that is material to the outcome of each of these cases or may be. I do not believe that the cases can be dismissed on a motion to dismiss. I do think evidence could be adduced — I do not know whether or not it will be — that will present a claim or a question as to whether demonstrably less qualified blacks were promoted or hired in preference to demonstrably better qualified whites. As I view it, the Consent Decree does not require that action. As I also view and understand it, the Court of Appeals in its decision on the earlier appeal of the intervention questions and the base — or the Bennett decision has indicated that that type of preferential treatment not being required by the Decree may give rise to a claim of discrimination and I

[Page 21]

cannot on the basis of the materials before me determine that there is no genuine dispute about those matters. Now I do read, however, the Court of Appeals' decision apparently differently from what each of the three versions is that I have heard. I do believe that the Court of Appeals said there is no per se prohibition against an attack, indirect attack, in any event by a person whose rights may be affected during the implementation or claims implementation of the decree. To the extent the motions to dismiss or summary judgment take that position, I think the Court of Appeals said, no, that is not the law of this Circuit. I also disagree with the plaintiffs' position which uses other language of that opinion to indicate that if individuals have suffered as a result of the implementation of the decree, that they necessarily have a right to proceed since they weren't bound by or parties to that decree. I do not believe that is what the Court of Appeals said. The Court of Appeals said that presents a very difficult question and did not decide it. I am prepared to decide that if preferential treatment is mandated by the decree, then it constitutes a good defense but I cannot tell from the facts of the various cases whether this is true in one or

more of the cases and that would be a matter that will need development

[Page 22]

by discovery and by presentation. I do not view it as the United States' [sic] does, however, as being merely a tie-breaker situation. That is not the words either of the Consent Decree. The Consent Decree does provide an out in effect translating it or transferring it from mandatory to permissive where one is demonstrably better or less qualified. And as I view it those words have some significance and the mere — it is not merely a situation of whether there is on perhaps even a suggestive basis conclusion that one is better or less qualified but in order to get out of the mandated aspect of the Consent Decree, one must look to the question of whether there is a demonstrably better or less qualied [sic] and in that situation it changes it from mandatory to permissive and in turn, as I view and understand the Court of Appeals' decision, as well as making my own decision on the question that the Court of Appeals did not address, I conclude that there is that question open for resolution in these various cases and is on that basis that I am denying the motions to dismiss or for summary judgment and prepared to go forward to get on with this case, with the several cases. There is a lot of paperwork and there is very good briefing that has gone on. There is also a lot of paper that has been filed thus far in the motion to

[Page 23]

hold the United States in contempt, and I am sure if I let it go on I will get a long brief in response. I do not want to deal with that issue. The United States was obliged under the Decree to support the Decree against collateral attacks, both as to permissive and mandatory aspects of the Decree. In that sense I disagree with counsel for the United States' more narrow interpretation of that same Decree; however, that undertaking was done prior to the Court of Appeals decision and must be evaluated in the light of the Court of Appeals decision which as I view it has made a change in the law.

I do not believe the United States, as would be true with any other party, is obliged to take a position with respect to a matter of law that has been held to be not the correct statement of law. Now I have indicated I have some disagreement with the United States' position as it talks only about the tie-breaker and, as I view it, there is a broader area of mandated requirements under the Decree, but it is perhaps something the United States can deal with bearing in mind my ruling in the decision of its further position of this litigation.

Prepare now to go forward with the question of getting these cases ready for disposition, for determination.

[Page 24]

It doesn't appear to me that there are that many critical factual issues that are going to have to be resolved. That most of the matters are going to be one [sic] that are virtually susceptible of stipulation. I do not know the extent to which this is true. I do -- I am concerned that the work that is done from this point forward be done to get the cases ready for a decision and not to proliferate paper. I am not going to give any certification under 1292, for example, for interlocutory appeal, if that were requested. I am not going to deal with other matters that will present the Court of Appeals with an incomplete when they are called upon to review. We need to get these various cases and I think they can be done in a matter of month's time to the point of getting the facts outlined and, right or wrong in my decision about what I think the law is in line with the Court of Appeals' decision, we at least need to get that resolution of the trial court and then get an appeal perhaps from all parties but we need to go ahead and do that.

Now with that admonition, I am going to take a short break and I want Mr. Alexander and Mr. Fitzpatrick to talk a few minutes and see if there is not some way of moving forward on this litigation.

[Page 25]

MR. ALEXANDER: Your honor, just before your honor breaks, we had discussed the prospects of picking a particular

case. I guess I continue to have more input from that of the other side, but in terms of discovery which has been identified that we would be interested in doing, we would certainly want to depose each named plaintiff. There are a number of those. We have at earlier times scheduled some depositions. There [sic] have been somewhat time-consuming. Our experience would suggest that while the cases can be readied in a reasonably short period of time, that some meaningful discovery with respect to — from us, the named plaintiffs, what their qualifications, what they have heard, what they have said, so forth, so on from Mr. Fitzpatrick and his colleagues, deposition of "decision-makers" which I would assume include a chain of command from first level supervisor to the appointed authority of the Mayor, if I mistake that, I can be corrected, but because some of the discovery in some of these cases where we have got six or seven or eight or nine named plaintiffs, we do have a good bit to do and I think we can do it expeditiously but it is not — I think perhaps the court overstates when it states it can be ready in a month's time.

THE COURT: I had assumed that counsel had already

[Page 26]

and were engaged in some discovery up to this point and perhaps there would not be perhaps that much more needed. That was my assumption when I said a month's period of time.

MR. ALEXANDER: Your honor, we have engaged in some discovery and scheduled additional discovery but concluded it needed additional —

THE COURT: I am not irritated at that. I can understand.

MR. FITZPATRICK: As far as the idea of getting one case ready, the cases coming out of different departments present different factual contexts and I think it would be a good idea for the court to have these different opportunities together so if it goes up, it goes up together.

THE COURT: That is the concern I have because I can imagine a situation which I based on my interpretation of the

law might rule that there had been failing on the part of the City in or with respect to one case, that there was something that was not required by the Decree, and that it was a discriminatory act, in the other cases it was required by the Decree and based on my interpretation, that was permissible. I think the Court of Appeals ought to have at least if not all of the cases a full range of that kind

[Page 27]

of situation so it will have to wrestle with the same problem.

MR. ALEXANDER: In that regard, your honor, I think and without consulting with my colleagues that we can speak in terms of a schedule that will occupy a good part of the summer and I am just, for example — I think it would be — this is based on the experience of the two day deposition. There are lots of parties and lots of folks that have vigorous interests and it is going to take a concerted effort to get these cases ready where perhaps the live testimony could at least possibly be reduced.

THE COURT: It may take that long.

MR. FITZPATRICK: I think if Mr. Alexander's analysis of perhaps a better part of the summer is correct and if we look toward a hearing either late August or early September, that that — if we went forward immediately and began working, I think we could present the court with a good, clean, quick trial where we had things boiled down to the point I think that the court would like to see. I know Mr. Wiggins has been joined in with us and I don't know much about his case, but I know he wants to engage in some discovery as well. I think he only has one other party in this case. We haven't had any motions to intervene there

[Page 28]

but—

THE COURT: Incidentally let me say this: There was no motion as far as I am aware of by the Personnel Board in these cases. Had there been one, I probably would have granted it. I am not sure that there is any real claim in these cases

against the Personnel Board but they may be needed to remain in the litigation in order to be bound by it.

MR. WHITESIDE: Your honor, we are trying to stay out of it but at the same time our interests are vitally affected in this case.

THE COURT: I gather that is true. I was just saying that from my interpretation there are not any charges that I would say the Personnel Board is doing anything in violation of the law as I understand it.

MR. FITZPATRICK: For purposes of further appeal, keeping them in here would therefore let us all go up together. As far as the actual discovery, I think a lot of that comes down to the question of cooperation between all counsel concerned and I know that Mr. Alexander is an easy person to get along with.

MR. ALEXANDER: Just wait.

MR. FITZPATRICK: I would think that if we could

[Page 29]

resolve a lot of these discovery issues informally we would be able to move this matter along.

MR. ALEXANDER: Your honor, I think we can work out a schedule. There is a question of Mr. Coleman's case.

THE COURT: Let me make a comment on that. The more I have thought through what is involved, the more I am convinced there cannot be a class action on behalf of the plaintiffs because it is of necessity, as I understand the law, going to involve in each and every case, if I am correct on the law, a matter of evaluating a white male plaintiff's position vis-a-vis a particular black male situation and in a very localized situation and I just don't see how there is any way that this case is going to accommodate a class action under the law as I view it. Now if I viewed the law differently, then, yes there could be a class action, but given my indication of the need to focus on the particular qualifications, if you will, I just don't see that that is going to lend itself to any class situation.

MR. ALEXANDER: Mr. Coleman's case needs to be in the pot though because I think his plaintiff involved someone who was directly affected by an individual named in the Consent Decree as being entitled to special consideration.

[Page 30]

THE COURT: I think the individual plaintiff that is in Mr. Coleman's case is the one that needs to go ahead and needs to be developed because it does present a somewhat different and important aspect of this litigation and needs to have a resolution for review at the same time as these other questions. I guess one thing I am really saying is although ordinarily certainly one should go forward rapidly to determine whether a class action should be maintained, I really don't want the parties to get bogged down in that when I don't think the case is going to end up as a class action. Similarly there is some — intervenors-defendants came in asking for a class to be certified for the defendants and amended pleadings seeking class determination was filed. Then we have these motions for discovery that go into the inquiry against the individual defendants and their entitlement to be a class representative and the like. Again, I think this is only going to slow down unnecessarily and unfruitfully the resolution of these cases and I really do not see the necessity for it and I think we are going to waste time unnecessarily on this matter.

MR. COLEMAN: Your honor, then we won't take any steps toward that end.

THE COURT: That should my view. If I am right on

[Page 31]

the law, I think I am right on the class action situation.

MR. COLEMAN: It is the practice though, your honor, that is what we were thinking of. Taking the demonstrably less qualified is a policy the City has followed.

THE COURT: It is but there is no way of ascertaining who is or who would be adversely affected by that except in the light of particular situations and it is not like all those who took a particular test. As a matter of fact, one client is simply one

individual and at least as I understand I don't think you would be able to represent but a very limited class. We can go around and start searching for other named plaintiffs but that this is a proliferation unnecessarily.

MR. FITZPATRICK: Your honor, I think you touched upon the intervenors' answer with regard to their class and we can propound questions to them with respect to that.

THE COURT: That isn't going to do a thing in this case except waste time.

MR. FITZPATRICK: I had to deal with the allegations.

THE COURT: It might make sense if we really needed a class for the defendant.

MR. FITZPATRICK: If they are willing to waive

[Page 32]

their class claim, then there is nothing to question them about it.

MR. JOFFE: That is entirely satisfactory with us.

MR. FITZPATRICK: As far as their individual rights or their individual interest, for instance. I gave them a question with respect to what they know about the plaintiffs and they refused to answer that. I am just searching for what facts they hold that may be admissible and as far as their —

THE COURT: This case is going to turn on the question of what the City did and it affects your relationship to other terms. It is going to turn on whether there are good class representatives or the like, what their individual situation is. They are in here really to defend the Decree. Seeing that the United States was not one that was totally to be trusted, at least from the standpoint of their viewpoint, but I think that is really where their position is and to assist and work with the City as they were bound to do so under the Decree to protect the Decree and the rights under the Decree of their class members there, but they may do that just as well by operating in an individual capacity here and attacking your evidence or developing other.

[Page 33]

MR. FITZPATRICK: I just was concerned about liability to seek knowledge of what evidence they have or what —

THE COURT: Certainly they would be required to make a disclosure of any evidence they would put on or cause to be put on.

MR. FITZPATRICK: I think I did propound questions to them which went to that and I filed a motion to compel and perhaps that hasn't been —

THE COURT: I think that matter can best be dealt with when you and Mr. Alexander talk with other counsel and you arrange the schedule on completiton [sic] of the discovery and listing the documents and the witnesses you will have and they will certainly be involved in that schedule.

MR. JOFFE: Your honor, our only objection to that particular question was we didn't have any discovery in and we didn't know what our discovery was. We have no objection to giving them more discovery before a hearing.

MR. ALEXANDER: Your honor, I have got some trial commitments in Montgomery this week but I would expect by early next week Mr. Fitzpatrick and I could have a schedule of what we expect to be done. I wonder if it might be appropriate toward the end of June or perhaps early July to have a status conference to indicate how far we have gone,

[Page 34]

what additional work needs to be done to determine perhaps a setting in the fall.

THE COURT: That certainly would be fine. It seems to me it would make some sense. I do suggest this: that at that conference, as would be true at any depositions or the like, that counsel, at least any counsel who may ultimately be seeking fees from somebody else in this litigation, need to exercise restraint. I would not anticipate awarding fees if that ends up being correct for more than two parties. I am talking about two attorneys who essentially have the same interest to be involved

in the same conference or deposition. That is just unnecessary hours being spent, so it is not to say you have to be more restricted. It is just to say if you are talking about any fees that is the limit, unless there is something highly unusual that would require more than two persons.

MR. FITZPATRICK: Your honor, one other discovery matter which I would anticipate a problem and which came up last year on the Tony Jackson matter is Mr. Alexander made a reference to everybody from the first-line supervisor up as being a decision-maker and as you may remember that caused some problem last year because I have a lot of union members who viewed themselves as on our side, so to

[Page 35]

speak, and they wish to talk to me. They hold facts which may be relevent [sic] for presentation and Mr. Alexander has got department heads who have been obviously City management personnel, but I am not sure that the way the City is set up anybody below that is in a confidential relationship. Now we did ask the Alabama State Bar for an opinion about that and we had a rather vigorous exchange of authority saying — I called Mr. Morrow and I reminded him of that and he told me that he had a lot of work to do. So I need some protection but yet I do have people who want to talk to me.

MR. ALEXANDER: I think your honor has previously indicated that the court is going to look on that ad hoc, so to speak. That does not of course foreclose me or my client from pressing the matter before the Bar association. This is a matter of great concern to both sides and for all obvious reasons.

THE COURT: Well, you are correct. I have indicated that I was not going to lay down the ethical standards in this litigation. I am really for the most part assuming subject to whatever the State Bar may conclude about it that a person has the right to choose whom he considers as his or her attorney. And that in that light, if there

[Page 36]

is a person who has a dual role, that person is entitled in effect to choose sides. That is not at the same time to say that one who has powers over such an individual may not impose appropriate sanctions as an employer, for example, for an employee who fails or refuses to cooperate. Again I am not making a decision on whether that is permissible or not. I am sure that you are familiar with a number of cases in which that kind of problem has come up of failure to cooperate with one's employer, but in terms of stopping the discovery I am not going to interfere.

MR. FITZPATRICK: It is a problem though that would probably come up as we go into discovery and I wanted to raise it at this time. I will remind Mr. Morrow of our request.

THE COURT: I would hope that counsel might also make some disclosure about what you would hope to prove from some of these persons, and it may be that you will find that you can agree that their testimony would be of a certain tenor without the need to go forward on that. And it may be that you can restrict and limit the number of persons who really have to be deposed in this area. I would certainly hope so.

MR. FITZPATRICK: If I had access to them, it would

[Page 37]

reduce that need for deposition.

MR. ALEXANDER: I suppose your access is at our peril. I don't understand why my batallion [sic] chiefs should be your witnesses. It is that simple.

MR. FITZPATRICK: I like what they say. Thank you.

THE COURT: Let's see if we can — yes?

MR. COOPER: Your honor, Charles Cooper again, the United States. I assume that we are not going to take a break and come back after all this?

THE COURT: That is correct.

MR. COOPER: If I may say a couple of things. First, we are certainly welcome to the court's obvious commitment to

getting these cases ready for trial with a minimum of extraneous skirmishes. May the United States proceed on the notion that the motion to amend our motion to dismiss is based in light of your remarks either is or will be granted?

THE COURT: It is. That will be granted. However, I should say I think the plaintiffs have acknowledged that there are two theories of action that for lack of administrative exhaustion are not before the court. That doesn't really change matters. The Safe Streets.

MR. COOPER: With respect to that, we did not seek

[Page 38]

to amend that part of our motion.

THE COURT: You may also assume that I am denying the motion for contempt in this case. And if there is a need to do something later down the track and renew the motion for contempt, I will look at it again. At least at this point, I am not going to schedule the motion for contempt in the Jefferson County case and instead will just sort of wait and see if the United States does live up to its commitment in the light of changed case law.

MR. COOPER: Your honor, in that regard, the United States would say here what we said in Judge Acker's court after we had been invited to intervene in that matter. The United States has every intention of vigorously defending the validity of the Decree and all of the relief required by the Decree, your honor, we have not taken one false step from that commitment and that obligation.

THE COURT: That is a matter that obviously is debatable.

MR. COOPER: It obviously is, your honor, but that is —

THE COURT: I think I have indicated that I am generally in accord with many of the positions, although I disagree with the tie-breaker that it is that narrow.

[Page 39]

MR. COOPER: No matter what our duty to defend is, it isn't to ask of the defendant-intervenors and the City to put an extra signature line on their documents.

THE COURT: I think it would have been except for the Court of Appeals' decision.

MR COOPER: Well —

THE COURT: I think you are certainly off the hook, if you want to put it that way.

MR. COOPER: Beg your pardon?

THE COURT: I think you got put off the hook by the Court of Appeals.

MR. COOPER: Had that not been done, we would not have moved a motion to dismiss. We in fact argued and won that case in that circuit and won on the positions on briefs that bear my name, so we recognize a difference in circuits when there is one and if we were in the Fifth Circuit, we would join in the motion to dismiss.

MR. ALEXANDER: Perhaps we will get this moved, your honor.

MR. COOPER: There is one other point, your honor, if I may beg the court's indulgence. When we acknowledged our glad acceptance of Judge Acker's invitation to participate in the Wilks and Zannis matters, we confessed to Judge

[Page 40]

Acker that we had not done — had not been able to at that point in time the kind of factual investigation that one must do consistent with Rule 11. One can file a complaint. Based on our interventions as nominal parties plaintiff as we made clear to Judge Acker on the simple fact that if in our view the allegations or some of them anyway in the complaint were made clear at trial and we are approved, then in fact we thought they would make out a case of unlawful conduct. Judge Acker allowed us until June 15th or the close of that discovery schedule in his court — he had just set a discovery schedule — to file a com-

plaint. We are a little bit unclear as to where we stand in that regard. Now the cases have been consolidated.

THE COURT: You may want to file a complaint or answer depending on which side you end up taking.

MR. COOPER: Absolutely, your honor, absolutely until the close of discovery.

THE COURT: Not until the close of discovery, until further discovery has occurred that allows you to determine the ultimate position you take on the facts of the particular case.

MR. COOPER: Very well, your honor, and it may be complaints and answers will be filed. Thank you sir.

[Page 41]

THE COURT: Is there anything else?

MR. JOFFE: Your honor, the only question I have is do I understand that the issue which you have said is the principal issue of the trial is whether demonstrably less qualified blacks have been hired in preference to more qualified whites and that in essence is the factual issue?

THE COURT: That is the factual issue as I see it in the context of these particular cases. As I said, whites and blacks. We have got a male and female case. I don't think other than Mr. Wiggins' case we have another male-female case because it wouldn't be able to be in under 1981, I suppose, and I don't know that there are any Title VII claims other than Mr. Wiggins' case involving male and female.

MR. FITZPATRICK: Some of the police officers have that in there.

MR. JOFFE: In essence, your honor, saying it is not open as an issue as to whether the decrees are per se unlawful or whether the decrees are unlawful in some other ways. You seem to be saying that you will hold that the decrees are unlawful.

THE COURT: That is correct. That is an issue, as

[Page 42]

I view it, the Court of Appeals did not decide but then it still is a question of lawful in the sense that the mandated aspects of the Decree may be carried out without liability. As I understand the Court of Appeals' decision, that is a permissible conclusion to be reached with their decision.

MR. ALEXANDER: Your honor, with respect to the issues that we have to deal with, one concern I have is the extent to which the Personnel Board's testing procedures will bear upon and the Personnel Board's practices will bear upon demonstrable qualifications. That is obviously a broad and complex issue and I am not certain if it is one that we can avoid.

THE COURT: I don't know. I recognize the problem. The Decree is not definitive in terms of what is a job selection procedure that is job-related. Whether it is limited simply to such things as tests or whether it may include some other matters, and it does include tests, to whatever extent this involves the inquiry into the Personnel Board test. We also have the problem we have had before about demonstrably better qualified and the Personnel Board in its brief sometime back addressed that very same point with respect to the propriety or impropriety of using SEM's or SED's in that question.

[Page 43]

MR. JOFFE: My concern along the line is if the plaintiffs for instance put in the fact that they have a particular white that had a three point higher test score than a particular black and as far as they are concerned that proves that the white was demonstrably better qualified than the black, we will be in the position not only of saying of course the three points doesn't prove anything but that the test itself is not job-related and if that is the case, it may be very difficult to get this case ready for trial by September.

THE COURT: It may be and I think that is one area in meeting again in late June that will have to be gone into after you have moved on forward a little bit better with the other discovery.

Other comments or questions?

(No response.)

THE COURT: All right. Thank you very much.

[Certificate omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANTS
RICHARD ARRINGTON, JR.
AND THE CITY OF BIRMINGHAM
FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, defendants Richard Arrington, Jr., and the City of Birmingham (hereafter collectively the "City") move the Court to enter partial summary judgment in their favor and against each of the plaintiffs in these consolidated cases to the extent that their claims of unlawful reverse discrimination are predicated upon (1) the results of written tests administered by the Jefferson County Personnel Board (hereafter "Board") as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board. There are no genuine issues of material fact and the City is entitled to partial summary judgment as a matter of law.

This motion is based upon: (1) the Consent Decree With The City of Birmingham ("City Decree"), (2) the Consent Decree With The Jefferson County Personnel Board ("Board Decree"), (3) the Response of the Personnel Board of Jefferson County to the First Request for Admissions From Defendants Richard Arrington, Jr., and the City of Birmingham ("Board Response"), (4) the Answers and Objections of the City of Birmingham and Richard Arrington, Jr., to the First Continuing Interrogatories From the United States ("City Answers"), (5) the Personnel Board of Jefferson County, Alabama, Rules and Regulations as Revised July, 1979 ("Board Rules"), attached hereto as Exhibit 1, (6) the Affidavit of W. Gordon

Graham, attached hereto as Exhibit 2, (7) the Affidavit of John L. Duncan, attached hereto as Exhibit 3, (8) the Affidavit of O. Neal Gallant, attached hereto as Exhibit 4, and (9) the Affidavit of Arthur V. Deutcsh, attached hereto as Exhibit 5.

Under paragraph 2 of the City Decree, the City may exercise a right not to "promote a less qualified person, in preference to a person who is demonstrably better qualified based on the results of a job related selection procedure." Relying on this provision, plaintiffs assert that the City was not compelled to promote blacks or females who scored lower than competing whites or males on written promotional tests administered by the Board or who ranked lower on the Board's "Eligible Register." The Register is a "record containing the names of those persons who have successfully completed prescribed tests, listed and ranked in order of their final earned average from the highest to the lowest and are considered qualified for original appointment to positions in the class for which the test was held." (Board Rules p. 51) Rank on the "Eligible Register" is determined by the Board's practice of adding to the raw score obtained by an individual who has passed a promotional examination "one point for each year of full-time employment in the classified service up to and including twenty years." (Board Rules 3.8(i)(2); Board Response No. 101)

Acceptance of plaintiffs' theory would necessitate resolution of the complex issues pertaining to the validity and/or rank-order validity of the Board's tests and selection procedures, which vary materially with each position at issue. The City, however, asserts a dispositive defense. The City does not possess the test scores of competing candidates or the "Eligible Registers." The City cannot, and does not, exercise any rights it may have under paragraph 2 of the City Decree on the basis of such information. Plaintiffs' claims, to the extent they are predicated in whole or in part upon test scores or rank on an "Eligible Register," must fail.

* * *

[Certificate of Service, dated December 21, 1984, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	
BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S

MOTION OF DEFENDANT-INTERVENORS FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, defendant-intervenors John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard move the Court to enter partial summary judgment in their favor against each of the plaintiffs to the extent that plaintiffs' claims against defendants Richard Arrington, Jr. and the City of Birmingham (collectively, the "City") are predicated upon (1) the results of written tests administered by the Jefferson County Personnel Board (the "Board") as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board. The City made a similar motion on December 21, 1984. The City and defendant-intervenors are entitled to partial summary judgment as a matter of law.

Plaintiffs claim that they are better qualified for certain promotions to positions with the City than are blacks and females who received those promotions and that they therefore have a right to those promotions. They apparently believe that results of the Board's written tests and rank on the Board's Eligible Register are material to that claim.

Contrary to plaintiffs' position, however, and in support of defendant-intervenors' position that neither Board test results nor rank on an Eligible Register raises a genuine issue as to any material fact, defendant-intervenors show the Court as follows:

1. The Consent Decree With the City of Birmingham (the "City Decree") provides a complete defense to any claim challenging the promotion of a qualified black or female in good faith compliance with the goals of the decree. Although plaintiffs have argued that paragraph 2 of the City Decree withdraws that defense in any case in which a qualified black or female is promoted in preference to a "demonstrably better qualified" white male, that interpretation of paragraph 2 is illogical, would nullify the purposes of the City Decree and is inconsistent with the understanding of the parties at the time the decree was signed and approved.

2. Even if the City Decree provided no defense in the circumstances of this case, plaintiffs could still not rely on Board test results or rank on an Eligible Register in trying to make out their claims. The City is not legally required to consider such data, which is not made available to it as a matter of Board policy. There is no evidence that the parties to the City Decree intended to modify that practice. Accordingly, any claim predicated on the City's use or misuse of such data must fail.

WHEREFORE, defendant-intervenors request the Court to enter an order granting partial summary judgment in their favor and against each of the plaintiffs in these consolidated cases to the extent that their claims are predicated upon (1) the results of written tests administered by the Board as a prerequisite to consideration for promotion to positions with the City and (2) rank on an "Eligible Register" prepared by the Board.

December 31, 1984.

Respectfully submitted,

/s/ Robert D. Joffe

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[Certificate of Service and attachments omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT K. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 83-AR-2116-S
JAMES A. BENNETT, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.* UNITED STATES OF AMERICA, *Plaintiff-Intervenor.*	CIVIL ACTION NO. CV 82-P-0850-S

COMPLAINT IN INTERVENTION

The United States of America, plaintiff-intervenor, by William French Smith, Attorney General, alleges:

1. This complaint is filed by the Attorney General on behalf of the United States to enforce the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261, March 24, 1972); to enforce the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716); and for the pur-

pose of protecting and enforcing rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §§ 1981, 1983.

2. The Court has jurisdiction of this matter pursuant to 42 U.S.C. § 2000e-6, 28 U.S.C. § 1345, and 31 U.S.C. § 6720.

3. The *Bennett, et al* v. *Arrington, et al.*, CV 82-P-0850-S, action was commenced by James A. Bennett *et al.*, on April 4, 1982. The *Wilks, et al.* v. *Arrington, et al.*, CV 83-AR-2116-S, action was commenced by Robert K. Wilks *et al.*, on September 7, 1983. On April 2, 1984, these actions were consolidated with other actions under *In Re: Birmingham Reverse Discrimination Employment Litigation*, CV 84-P-0903-S. Since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in these cases as plaintiffs.

4. Plaintiffs are all residents of Jefferson County, Alabama, and are over the age of twenty-one years.

5. Defendant City of Birmingham is a political subdivision of the State of Alabama and an employer within the meaning of 42 U.S.C. §2000e(b), as amended.

6. Defendant Richard Arrington, Jr., is Mayor of the City of Birmingham and is responsible for the administration and operation of the city government of Birmingham, including the hiring, assigning, and promoting of employees of the City.

7. Defendant Jefferson County Personnel Board is an agency of Jefferson County established pursuant to the laws of the State of Alabama (Act. No. 248 of the 1945 Alabama Legislature, as amended, hereinafter referred to as the "Enabling Act"), and is an employer within the meaning of 42 U.S.C. § 2000e(b). Defendant Jefferson County Personnel Board is engaged in the procuring and screening of applicants for promotion, in the certification of eligibles for promotion to the defendants named in paragraphs 5 and 6, and is further engaged in the administration of a civil service system for such defendants.

8. Plaintiffs are all white, male employees of the Birmingham Fire and Rescue Service of the City of Birmingham. Pursuant to the provisions of the Enabling Act, the plaintiffs all have applied for, and taken examinations for promotion to the classifications of Fire Lieutenant and/or Fire Captain of the Birmingham Fire and Rescue Service.

9. The defendants enumerated in paragraphs 5 and 6 have received revenue sharing allocations from the United States Treasury pursuant to the nondiscrimination provisions of the State and Local Fiscal Assistance Act of 1972, as amended (31 U.S.C. § 6716 *et seq.*).

10. Defendants City of Birmingham and Richard Arrington, Jr., have pursued and continue to pursue policies and practices that discriminate against white males and that deprive or tend to deprive white males of employment opportunities in the promotional positions of Fire Lieutenant and Fire Captain because of their race. Defendants implement these policies and practices, among other ways, as follows:

a. By following a practice of promoting black firefighters and Fire Lieutenants in the Birmingham Fire and Rescue Service in preference to demonstrably better qualified white firefighters and Fire Lieutenants.

b. By promoting black candidates to Fire Lieutenant and Fire Captain over white candidates exclusively on the basis of race and without regard to relative qualifications.

c. By refusing or failing to take appropriate action to eliminate discrimination against white, male employees certified as eligible by the Jefferson County Personnel Board who were and are seeking promotion to the positions of Fire Lieutenant and Fire Captain in the Birmingham Fire and Rescue Service.

11. In accordance with Section 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6, the United States, through the Department of Justice, has investigated the employment practices of the defendants and has attempted to eliminate the policies and practices described in paragraph 10 above and has attempted to eliminate those policies and practices through negotiation and settlement.

12. The policies and practices of the defendants, described in Paragraph 10 above, constitute a pattern or practice of resistance to the full enjoyment by white males of their right to equal employment opportunities without discrimination based upon race. This pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by Title VII of the Civil Rights Act of 1964, as amended, and is in violation of the obligations imposed by the State and Local Fiscal Assistance Act of 1972, as well as rights guaranteed by the Fourteenth Amendment to the Constitution of the United States and by 42 U.S.C. §§ 1981 and 1983. Unless restrained by order of this Court, the defendants will continue to pursue policies and practices the same as or similar to those alleged in this Complaint.

WHEREFORE, plaintiff-intervenor prays for an Order permanently enjoining the defendants, Richard Arrington, Jr. and the City of Birmingham, their officers, agents, employees, successors, and all persons in active concert or participation with them from:

(a) promoting black firefighters and Fire Lieutenants in preference to better qualified white firefighters and Fire Lieutenants;

(b) failing to make compensatory payments, to award retroactive seniority, and to award future promotional priority to rejected white promotional candidates who have been victimized by the practices described in paragraph 10 above; and

(c) failing to take other appropriate measures to overcome the present effects of past discriminatory policies and practices.

Plaintiff-Intervenor prays for such other additional relief as justice may require, together with its costs in this action.

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Attorney General

/s/ William Bradford Reynolds
WILLIAM BRADFORD REYNOLDS
Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant
Attorney General

/s/ Frank W. Donaldson
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/s/ Mary E. Mann
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[Certificate of Service, dated January 14, 1985, omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
JAMES A. BENNETT, *et al.*, *Plaintiffs,* v. RICHARD ARRINGTON, JR., *et al.*, *Defendants.*	CIVIL ACTION NO. CV 82-P-0850-S

MOTION OF UNITED STATES TO REALIGN AS PARTY-PLAINTIFF

The United States of America respectfully moves the Court for leave to realign as a party-plaintiff in *James A. Bennett, et al.* v. *Richard Arrington, Jr., et al.*, CV 82-P-0850-S.

A Memorandum in support of this Motion and Certificate of Plaintiffs' Counsel are attached hereto and incorporated herein.

WHEREFORE, the United States prays that its Motion be granted.

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Assistant Attorney General

/s/ Charles J. Cooper
CHARLES J. COOPER
Deputy Assistant
Attorney General

FRANK W. DONALDSON
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[Certificate of Service, dated January 14, 1985, and memorandum omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re: BIRMINGHAM REVERSE DISCRIMINATION EMPLOYMENT LITIGATION	CIVIL ACTION NO. CV 84-P-0903-S
ROBERT W. WILKS, *et al.*, *Plaintiffs*, v. RICHARD ARRINGTON, JR., *et al.*, *Defendants*.	CIVIL ACTION NO. CV 83-P-2116-S

ANSWER AND COUNTERCLAIMS OF DEFENDANT INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA MCGRUDER, SAM COAR, EUGENE THOMAS AND CHARLES HOWARD TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

Defendant-intervenors, John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard (the "Defendant-Intervenors") for their answer to the complaint in intervention of the United States of America in CV-83-P-2116-S (hereinafter "complaint") answer as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The complaint constitutes an impermissible collateral attack upon the "Consent Decree With The City Of Birmingham"

entered by this Court on August 21, 1981, in Civil Action Nos. 75-P-0666-S, 74-Z-17-S and 74-Z-12-S ("City Decree").

THIRD DEFENSE

The complaint constitutes an impermissible collateral attack upon the "Consent Decree with the Jefferson County Personnel Board" entered by this Court in Civil Action Nos. 75-P-0666S, 74-2-17-S and 74-2-12-S ("Board Decree").

FOURTH DEFENSE

The complaint is in flagrant violation of the obligation of the United States, imposed by the City Decree, to defend the lawfulness of all remedial actions and practices required or permitted by the City Decree.

FIFTH DEFENSE

The complaint is barred by the City Decree.

SIXTH DEFENSE

The complaint is barred by the Board Decree.

SEVENTH DEFENSE

The City's consideration of the race of competing candidates for promotions to fire lieutenant and fire captain positions with the Birmingham Fire and Rescue Service was a direct consequence of the City Decree and was authorized, required or permitted by the City Decree, to which the United States of America ("United States") is a party.

EIGHTH DEFENSE

The United States has waived its right to invoke the jurisdiction of this Court and to seek relief for the claims alleged in the complaint.

NINTH DEFENSE

In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Acts [sic] of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States." In reliance on the representations of the United States and at the request of the United States the City and Defendant-Intervenors executed the City Decree. Also in reliance on those representations, the City, where appropriate, made numerous race and gender conscious personnel decisions pursuant to its terms, and Defendant-Intervenors compromised their discrimination claims against the City. The United States is estopped to invoke the jurisidiction of this Court and thus, may not litigate the matters addressed in the complaint, all of which involve remedial actions authorized, required or permitted by the terms of the City Decree.

TENTH DEFENSE

To the extent that the United States contends that the race-conscious promotion decisions of the City challenged in the complaint were not authorized, required or permitted by the City Decree, the United States has failed to satisfy the preconditions to litigation of such claims specified by ¶ 4 of the City Decree.

ELEVENTH DEFENSE

The complaint is an abuse of process which is intended to coerce the City to abandon or compromise its obligations to Defendant-Intervenors and others under the City Decree, which the City accepted at the request of the United States.

TWELFTH DEFENSE

The United States has failed to satisfy the preconditions to this suit under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Specifically, the United [States] has failed to: (a) file charges of employment discrimination against the City, the Board or either of them, (b) conduct an investigation of the alleged unlawful employment practices of the City, the Board or either of them (c) enter findings that it has reasonable cause to believe that the City, the Board or either of them has engaged in a pattern and practice of unlawful employment discrimination, (d) provide notice to the City, the Board or either of them of such findings, and (e) engage in conciliation efforts with the City, the Board or either of them, all as required by 42 U.S.C. §§ 2000e-5 and 2000e-6 and Section 5 of Reorganization Plan No. 1 of 1978, [1978] *U.S. Code Cong. & Admin. News*, 9795, 9800.

THIRTEENTH DEFENSE

The United States lacks standing to prosecute the instant action pursuant to 42 U.S.C. §§ 1981 and 1983.

For further answer to the numbered paragraphs of the complaint, Defendant-Intervenors:

1. Deny the averments of paragraph 1.

2. Deny the averments of paragraph 2.

3. Admit the averments of paragraph 3 except state that (1) *Bennett* was filed on April 14, 1982, (2) the correct case number of *Wilks* is CV-83-P-2116-S, (3) by order dated April 14, 1984, a master case file for the consolidated cases was established under the caption "In re: Birmingham Reverse Discrimination Employment Litigation," CV-84-P-0903-S, and (4) since and before April 2, 1984, other individual members of the Birmingham Fire and Rescue Service have sought and have been granted leave to intervene in *Wilks*, but not in *Bennett*.

4. Admit the averments of paragraphs 4 and 5.

5. Admit that Richard Arrington, Jr., is the Mayor of the City of Birmingham but state that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6.

6. State that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 7 thereof.

7. Admit the averments of the first sentence of paragraph 8 thereof, but deny the remaining averments of paragraph 8 thereof.

8. State that they lack knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 thereof.

9. Deny the averments of paragraph 10 thereof, except state upon information and belief that the City has considered the race and gender of competing promotional candidates in making promotions to Fire Lieutenant and Fire Captain positions to the extent authorized, required or permitted by the City Decree and as a direct consequence thereof.

8. Deny the averments of paragraphs 11 and 12 thereof.

9. Deny that the United States is entitled to any relief whatsoever.

10. Except as expressly admitted, Defendant-Intervenors deny the averments of the complaint.

WHEREFORE, these defendants demand a judgment in their favor and an award of costs and attorneys' fees incurred in the defense of the complaint.

COUNTERCLAIM OF DEFENDANT-INTERVENORS JOHN W. MARTIN, MAJOR FLORENCE, IDA McGRUDER, SAM COAR, EUGENE THOMAS AND CHARLES HOWARD TO THE COMPLAINT IN INTERVENTION OF THE UNITED STATES

I.

1. Pursuant to Rule 13 of the Federal Rules of Civil Procedure, Defendant-Intervenors set forth the following counterclaims:

II.
Jurisdiction

2. This Court has jurisdiction of this counterclaim pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202 and 5 U.S.C. §§ 702, 703, 705 and 706, separately and severally.

III.
PARTIES

3. John W. Martin, Major Florence, Ida McGruder, Sam Coar, Eugene Thomas and Charles Howard ("Defendant-Intervenors"), plaintiffs in Civil Action CV-75-P-0666-S are party signatories to the "Consent Decree with the City of Birmingham" and the "Consent Decree with the Jefferson County Personnel Board" entered in the Decree cases (hereinafter "City Decree" or "Board Decree" respectively).

4. The City of Birmingham ("City"), a defendant in Civil Action CV-75-P-06660-S [sic], is a party signatory to the City Decree entered in the Decree cases.

5. The Jefferson County Personnel Board ("Board"), a defendant in Civil Action CV-75-P-0666-S is a party signatory to the Board Decree entered in the Decree cases.

6. The United States of America ("United States"), a plaintiff in Civil Action CV-75-P-0666-S, is a party signatory to the City Decree and the Board Decree entered in the Decree cases.

IV.
Claim One

7. On September 7, 1983, plaintiffs, certain white male employees of the Birmingham Fire and Rescue Service, filed a complaint in CV-83-P-2116-S against defendants Richard Arrington, Jr., and the City of Birmingham collaterally attacking the legality of remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, the Consent Decrees entered by this court on August 21, 1981, in *U.S. v. Jefferson County*, No. CV-75-P-0666-S, *Martin v. City of Birmingham*, No. CV-74-Z-17-S and *Ensley Branch of the NAACP v. Seibels*, No. CV-74-Z-12-S (hereafter collectively the "Decree Cases"). On March 6, 1984, an order was entered allowing John W. Martin, *et al.*, to intervene as parties defendants in CV-83-P-2116-S.

8. The City Decree obligates all parties thereto to defend the lawfulness of the remedial measures contained in the Decree in the event of a collateral attack. Paragraph 3 of the City Decree provides:

> Remedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of, this Consent Decree shall not be deemed discriminatory within the meaning of paragraph 1 above or the provisions of 42 U.S.C. 2000e-2(h), (j), and *the parties hereto agree that they shall individually and jointly defend the lawfulness of such remedial measures in the event of challenge by any other party* to this litigation or by any other person or party who may seek to challenge such remedial measures through intervention or collateral attack.

(Emphasis added)

9. Paragraph 54 of the City Decree provides:

> 54. Compliance with the terms and conditions of this Consent Decree shall constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment of the Constitution

of the United States as raised by the plaintiffs' complaints. Insofar as any of the provisions of this Consent Decree or any actions taken pursuant to such provisions may be inconsistent with any state or local civil service statute, law or regulation, the provisions of this Consent Decree shall prevail in accordance with the constitutional supremacy of federal substantive and remedial law.

10. The City has at all times performed its obligations under the terms of the City Decree and has made numerous race- and gender-conscious promotion and employment decisions pursuant to the terms of that Decree. Each of the City's race- and gender-conscious decisions challenged by the plaintiffs was authorized, required or permitted by the City Decree.

11. Pursuant to paragraphs 51 through 53 of the City Decree, the City has submitted various reports to the United States and the Defendant-Intervenors in the Decree Cases. Such reports contained comprehensive information, as designated by paragraphs 51-53 of the City Decree, concerning the race and gender of individuals hired by or promoted by the City.

12. The United States has not notified the Defendant-Intervenors that the City has improperly implemented the City Decree.

13. On February 28, 1984, the United States intervened as a party plaintiff in this action although it refused to file a complaint in intervention until January 14, 1985, the date specified by the Court as the time within which the United States must state its position.

14. On January 14, 1985, the United States filed a "Complaint In Intervention" in CV-83-P-2116-S alleging, in substance, that the remedial actions taken by the City as a direct consequence of the City Decree unlawfully discriminated against white males, and requested relief which is contrary to the requirements imposed on the City by the City Decree.

15. Since February 28, 1984, the United States has breached its obligations under the City Decree by: (i) providing economic and other support to the individual plaintiffs in CV-83-P-2116-S (hereafter "plaintiffs"), (ii) assisting counsel for plaintiffs in the prosecution of their claims against the City,

(iii) failing to support and cooperate with the City and the Defendant-Intervenors in their defense of the plaintiffs' claims, (iv) filing the "Complaint in Intervention" which supports the allegations of the plaintiffs, (v) invoking the jurisdiction of this Court to challenge the actions of the City which the United States represented in the City Decree it would consider to be in compliance with the statutory and constitutional provisions set forth in ¶ 54 of the City Decree, and (vi) requesting relief which, if granted, would be inconsistent with the City's obligations under the City Decree.

16. Defendant-Intervenors have been injured directly and substantially by the breach of the United States of its obligations under the City Decree.

Claim Two

17. Defendant-Intervenors adopt and reaver paragraphs 1-15 of the counterclaim and incorporate them as if set forth fully herein.

18. In the City Decree, the United States represented that (1) it would defend the lawfulness of the "[r]emedial actions and practices required by the terms of, or permitted to effectuate and carry out the purposes of" the City Decree and (2) compliance with the City Decree would "constitute compliance by the City with all obligations arising under Title VII of the Civil Rights Act of 1964, as amended, the State and Local Fiscal Assistance Act of 1972, as amended, the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, and the Fourteenth Amendment to the Constitution of the United States."

19. In reliance on the representations of the United States, Defendant-Intervenors executed the City Decree. The City Decree is valid and lawful.

20. The United States, in violation of the City Decree, is (i) providing economic or other support to the plaintiffs, (ii) assisting counsel for plaintiffs in the prosecuting of their claims against the City, (iii) failing to support and cooperate with the City and Defendant-Intervenors in their defense of

plaintiffs' claims, (iv) prosecuting the claims raised in its "Complaint In Intervention," (v) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vi) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree.

21. Such conduct by the United States constitutes unlawful and tortiuous [sic] interference with Defendant-Intervenors' contractual relations with the City of Birmingham and the United States under the City Decree.

22. By reason of such wrongful conduct and tortiuous [sic] interference with Defendant-Intervenors' contractual relations, Defendant-Intervenors have been injured directly and substantially by the conflicting positions adopted by the United States in these proceedings.

V.
Prayer for Relief

WHEREFORE, Defendant-Intervenors request this Court to:

(a) enter judgment dismissing the "Complaint In Intervention" and declaring that the United States has breached its obligations under the City Decree by: (i) arbitrarily and capriciously failing to abide by the terms of the City Decree; (ii) providing economic or other support to the plaintiffs, (iii) assisting counsel for plaintiffs in the prosecution of their claims against the City, (iv) failing to support and cooperate with the City and the Defendant-Intervenors in their defense of plaintiffs' claims (v) prosecuting the claims raised in its "Complaint In Intervention," (vi) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vii) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree;

(b) enter an order directing the United States to comply with its obligations under the City Decree;

(c) enter an order prohibiting the United States from: (i) providing economic or other support to the plaintiffs, (ii) assisting counsel for plaintiffs in the prosecution of their claims against the City, (iii) failing to support and cooperate with the City in its defense of plaintiffs' claims, (iv) prosecuting the claims raised in its "Complaint In Intervention," (v) invoking the jurisdiction of this Court to challenge actions taken by the City which are required, authorized or permitted under the City Decree, and (vi) requesting relief which, if granted, would preclude or hinder the City from complying with its obligations under the City Decree; and

(d) enter an order awarding Defendant-Intervenors their costs incurred in connection with this counterclaim and retaining jurisdiction for further proceedings concerning attorneys' fees pursuant to Local Rule 11.

Defendant-Intervenors pray for such other additional relief as justice may require.

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[Certificate of Service, dated February 13, 1985, omitted]